2024:BHC-NAG:443

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

CRIMINAL APPLICATION (APPLN) NO.1/2024
Sunil s/o late Chhatrapal Kedar
..vs..
State of Mah., thr.PSO of PS Ganeshpeth, District Nagpur

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

Shri Sunil V.Manohar, Senior Counsel with Shri D.V.Chauhan, Counsel & Shri N.R.Jadhav, Advocate for the applicant.
Shri Raja Thakare with Shri Ajay Misar, Special Public Prosecutors for the Non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 09/01/2024

1. By this application under Section 389(2) of the Code of Criminal Procedure, the applicant seeks suspension of sentence and grant of bail.

2. The applicant has 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 Appeal No.397/2023 before learned District and Sessions Judge, Nagpur. The applicant had also preferred an application for suspension of sentence which was rejected by learned District Judge-12 and Additional Sessions Judge, Nagpur by order dated 30.12.2023.

3. The applicant is educated as Bachelor of Science and also an agriculturist and also a member of Indian National Congress representing Saoner Assembly Constituency. He is original accused No.1 in Crime No.101/2002 registered with Ganeshpeth Police Station, Nagpur. He was acting Chairman of the Nagpur District Central Cooperative Bank (NDCC Bank).

4. As per contentions of the applicant, on 25.4.2002, First Information Report was registered at his behest against brokers namely, Home Trade Limited (HTL); Century Dealers, Giltage Management; Indramani Merchants, and Syndicate Management Services alleging that the NDCC Bank had invested amount Rs.125.60 crores for purchasing the 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, they have not delivered the same and supplied only photocopies and, therefore, the applicant lodged report alleging that funds of the bank have been misappropriated and the bank is duped by its brokers to the tune of Rs.125.6 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 the applicant and six

others. As per allegations, the applicant in conspiracy with the co-accused misappropriated funds of the bank to the 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 in favour of the bank. As per allegation in the complaint, the applicant, without any approval from the board of the bank for sale and purchase of the government securities, invested the amount by transferring the same to the brokers for purchasing the government securities, but the brokers have not purchased the same and the bank did not have the original securities. Thus, the applicant, who is the Chairman of the bank, having conspiracy with the said brokers' companies and their officials and with officials of the bank, misappropriated the funds of the bank and duped the bank and acted in breach of trust while carrying out his responsibilities.

5. After filing of chargesheet, 53 witnesses were examined by the prosecution. After appreciation of evidence, learned Additional Chief Judicial Magistrate convicted the applicant and sentenced to suffer rigorous imprisonment for

five years and to pay fine Rs.10.00 lacs of the offence punishable under Sections 409 read with 120-B of the Indian Penal Code. The applicant further convicted of the offence punishable under Sections 406 read with 120-B of the Indian Penal Code, but no separate sentence is awarded. He is also convicted of the offence punishable under Sections 468 read with 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 Sections 471 read with 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 3 months.

6. The judgment and order of sentence and conviction is challenged by the applicant by preferring Criminal Appeal No.397/2023 along with application for suspension of sentence which was rejected.

Hence, this application.

7. Heard learned Senior Counsel Shri Sunil V.Manohar for the applicant. He submitted that the applicant is charged

with the offences punishable under Sections 406, 120-B, 409, 468, and 471 of the Indian Penal Code. The allegations revolve around two transactions; (1) as regards the advancement of loan of Rs.40.00 crores to EDIL, the evidence and observation of the judgment show that the said amount is repaid by the EDIL and (2) the applicant along with accused Nos.2 and 11, without observing guidelines issued by the NABARD, invested the amount exceeding 5%. The period of alleged transactions by the applicant and other accused regarding purchasing of the government securities through HTL were during 5.2.2001 to 12.6.2001 and the similar transactions through HTL and four other broker companies were during 25.1.2002 to 5.2.2002. The subject and sale and purchase of transactions of physical securities was not discussed in any of meetings of board of directors and its approval was not taken. It is further alleged that original physical securities, holding certificates or any other documents, will show that the securities purchased for the NDCC Bank were not available in its record. The senior officer of the NDCC Bank has not verified and confirmed as to whether physical securities were really purchased and that too in the name of the NDCC Bank and not filed report thereof in the bank. An expert advice was not taken though these transactions were technical, complicated, and highly risky. He submitted that thus the nature of allegations against the

applicant is that the applicant and other officials of the bank have committed irregularities and illegalities contravening the circulars and guidelines issued by the RBI and NABARD and by violating, the transactions are entered into. Thus, the nature of the charge appears to be that the board has delegated the powers to the Chairman by resolution to purchase and sale the securities only through MSCB under SGL(II) with the RBI and without taking any policy decision, transaction are entered through the brokers without approving the panel of brokers for the purpose. He submitted that the observations of the court is contrary to the evidence. In fact, Exhibit-1185 is the resolution passed by the board of directors, which shows as :

> "in suppression of the previous resolutions No.7 of the Nagpur District Central Cooperative Bank Limited, Nagpur dated 21.9.1993 it is hereby resolved that any two of following namely 1. Shri S.C.Kedar, Chairman, 2. Sau.A.C.Mahajan, Vice Chairman, Shri A.N.Chaudhary, General Manager, 4. Shri A.G.Gokhale, Chief Accountant, and 5. Shri S.S.Gode, Chief Officer are hereby authorized jointly to purchase, sale, endorse, negotiate, transfer or other deal with the government and any securities for and on behalf of the Nagpur District Central Cooperative Bank Limited, Nagpur and also to receive the principle and interests thereon."

He submitted that in view of the above resolution, the powers are assigned to the applicant and there is no reference either of SGL(II) or MSCB. The trial court held the same without any evidence on record. The inference drawn by

the trial court is that the alleged transactions are entered by keeping the directors in dark and without obtaining any approval by holding any meetings. The trial court has observed that the entire transaction has taken place on the basis of circular resolution. In fact, the resolution passed on 24.8.2001, which is at Exhibit-1194, shows that the investment of purchasing the government securities is brought to the notice in a meeting held on 24.8.2001. Not only this, the annual report of the bank Exhibit-1315 also shows that the said investment by way of purchasing the securities is also published in the said report and brought to the notice of all share holders. Thus, nothing is done in a secrecy. At the most, the act of the applicant shows that there is a contravention of violation and irregularities which can at the most be said to be a negligence on his part. There is no charge that the applicant has received any monetary gain by the said transactions. There is absolutely no evidence that the applicant was the member to the conspiracy and in view of the said conspiracy, the amount was transferred to the HTL and other securities.

8. Learned Senior Counsel for the applicant invited attention towards paragraph Nos.33 and 34 of the judgment and submitted that the trial court has observed that the

resolution Exhibit-1452 was passed by keeping the directors in dark. Paragraph No.35 shows the test applied by the trial court is on the basis of inference that the investment was made on the basis of circular resolution. The observation of the trial court further shows that amount of loan given to the EDIL is already recovered. The evidence discussed by the trial court itself shows that only evidence is in the nature of non observance of circular issued by the RBI and NABARD. It is sheer negligence. There has to be some evidence to connect the applicant showing that he conspired with the other accused who are officers of the HTL which is a broker company. In fact, the applicant is the person who, initially, as soon as the fact of non-supplying the securities to the bank is brought to the notice, lodged the First Information Report against the broker companies, which is not considered by the trial court. Subsequently, First Information Report is lodged by the NABARD which is much later. The First Information Report is lodged by the applicant on 25.4.2002 and the second First Information Report is lodged on 29.4.2002. He further invited my attention towards paragraph No.74 of the judgment which also shows that the trial court observed which are irregularities and discrepancies found in the NABARD inspection and pointed out by its communication. The overall observations of the trial court are that when the law prescribes a particular procedure

on particular aspect, it should be done in that manner only. The transactions relating to investment were being looked after by accused No.1 (the present applicant) and accused No.2 which are against the directives without any policy by the bank and accused Nos.1 and 2 or any officer of the NDCC Bank had not taken absolutely any step to call for original securities from the concerned brokers. Thus, he submitted that at the most, the case against the applicant covers to show that he was negligent while entering into the said transactions.

As far as the allegations, regarding criminal breach of trust by entering into the conspiracy with officials of the broker companies, are concerned, the evidence of investigating officer sufficiently shows that there was no material to connect the applicant with the said conspiracy. He submitted that the investigating officer specifically admitted that HTL Company has used the amount for their own use and some amounts they have already returned to the NDCC Bank. His evidence further shows that the amount is transferred to the HTL in various accounts, but no connection was found with the applicant. He specifically admitted that during investigation it nowhere revealed that there was some monetary transaction between the HTL and the applicant. The reports of the RBI and NABARD are also not proved properly. Thus, there is nothing to link the

applicant with the HTL and, therefore, the offence of criminal breach of trust is not made out against the applicant.

Thus, the applicant has many arguable points in the appeal and there are chances of acquittal in the appeal. In the meantime, if the sentence is executed, the appeal will become infructuous and irreparable loss will cause to the applicant.

9. In support of his contentions, learned Senior Counsel for the applicant placed reliance on the following decisions:

1. Afjal Ansari vs. State of U.P., reported in 2023(16) SCALE 775;

2. Bhagwan Rama Shinde Gosai and ors vs. State of Gujarat, reported in (1999)4 SCC 421;

3. Suresh Kumar and ors vs. State (NCT of Delhi), reported in (2001)10 SCC 338, and

4. C.Chenga Reddy and ors vs. State of Andhra Pradesh, reported in AIR 2996 SC 3390.

Thus, he submitted that it is settled law that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally, unless there are exceptional circumstances.

10. *Per contra*, learned Special Public Prosecutor Shri Raja Thakare for the State submitted that 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, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contact, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

He submitted that the amount invested is the public money. The NDCC Bank is established for the welfare of poor agriculturists and agriculturists are share holders. The securities are shown to be purchased. In fact, it was never purchased and large amount was transferred to the brokers. The evidence of PW25 Rodridgeus proves various circulars issued by the RBI are contravened. The prosecution has also examined Anita Mangesh Kenkre, who is the Chief General Manager of SEBI, who also stated that the Giltage Management Services Limited, Bombay; Syndicate Management Services, Ahmedabad, Indramani Merchants Private Limited and Century

Dealers Private Limited 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. The contention of the applicant that it was only irregularities is not sufficient. The applicant is law maker himself has misappropriated the public fund. During the trial also, he was on bail as the prosecution could not file chargesheet within the prescribed period. Thus, he was on default bail. If the applicant is released on bail, wrong signal will go in the society and sympathy, if granted to the applicant, would be misplaced sympathy.

11. 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.

12. Before adverting 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.

13. 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."

14. 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.

15. The Honourable Apex Court in the case of **Afjal Ansari vs. State of U.P.** *supra,* as relied by learned Senior Counsel for the applicant, 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. Sarvabhouma 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."

16. 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 ultimatey 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".

17. In the case of **Bhagwan Rama Shinde Gosai and ors vs. State of Gujarat** *supra*, 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."

18. 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)** *supra* 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.

19. In the background of the above well settled law and turning to the case in hand, it reveals that the applicant is convicted by observing in paragraph No.74 that during the NABARD inspection, the following irregularities and discrepancies are found:

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

20. The Judgment of the trial court further shows that the prosecution examined PW25, who is an officer of the RBI, who proved and confirmed various circulars and resolutions issued by the RBI from time to time in respect of the investment in the government securities. Existence and issuance of all circulars are also proved by PW48 Shri Deshmukh and accused No.1 (the present applicant) and accused No.2 have violated the directives issued by the RBI and NABARD from time to time while investing the government securities through HTL and four broker companies. The further observation of the trial court shows that the entire transaction, relating to investment, were being looked after by accused Nos.1 and 2 and the accounts of those transaction were maintained by PW7 Shri Wakhare and in his absence PW6 Shri Dani. According to these witnesses, accused No.2 informed them that from 2001 transactions of the government securities will be done through HTL. The transactions were not done

through SGL(II) account. From the judgment, it further revealed that the trial court observed that before doing any transaction of GOI (physical) securities, accused Nos.1 and 2 used to discuss with HTL either on phone or otherwise.

Learned Senior Counsel for the applicant submitted that the above observation is not supported by any evidence and the evidence of PW6 and PW7 shows that it was accused No.2 who informed them that the transactions will be done through HTL.

21. The sum and substance of the observation of the trial court is that crores of rupees were transferred to HTL under the guise of purchasing GOI (Physical) Securities which were never purchased for the NDCC Bank and when no such securities were ever purchased, there is no question of sale and, therefore, all sale and purchase transactions entered by accused No.1 and accused No.2 between the NDCC bank and HTL are completely false and forged. Whereas, in paragraph No.96, the trial court observed that the accused Nos.1 and 2 or any other officer of the NDCC Bank had not taken any steps to call for original securities from the concerned brokers or to confirm as to whether any such securities were ever purchased by them for the NDCC Bank. Thus, at once, the trial court held

that there was no such transaction at the same time it holds that the applicant has not taken steps to call for original securities.

22. Learned Senior Counsel for the applicant has taken me through the evidence and pointed out that the trial court held that the board has delegated the powers to the Chairman vide resolution No.14(6) dated 16.5.1999 (Exhibits-1193/3158) for purchase and sale of securities only through MSCB under SGL(II) with the RBI. Whereas, Exhibit-1185 shows that the applicant and the names mentioned therein were authorized jointly to purchase, sale, endorse, negotiate, transfer or other deal with the government and any securities for and on behalf of the NDCC Bank, Nagpur and also to receive the principle and interests due thereon which is blanket authority without referring either MSCB or SGL(II). This observation is without any evidence on record. The trial court has drawn the inference without any material. He further submitted that the trial court further observed that the entire transaction of purchasing government securities through HTL is by keeping board of directors in dark. Whereas, Exhibit-1194 shows that purchasing on government securities through HTL is brought to the notice of all members by passing resolution. It is not only brought to the notice of board of directors, but it was also

brought to the notice of all share holders by publishing the same in annual report. Thus, the inference drawn by the trial court is without evidence. The nature of allegation and evidence shows that the applicant has violated the norms and it is observed during the inspection by NABARD. He further submitted that at one breath the trial court has observed all sale and purchase transactions shown to have been entered by the applicant and accused No.2 between the NDCC bank and HTL are completely false and forged. Whereas, on second breath, it is observed that accused Nos.1 and 2 and other officers of the the NDCC bank has not taken any steps to call for original securities from the concerned brokers or to confirm as to whether any such securities were ever purchased by them for the NDCC Bank. By observing this, the trial court observed that there was a conspiracy between the applicant and officers of the HTL. In fact, the trial court ought to have considered that it was the applicant who has lodged the First Information Report when those facts are brought to his notice. He submitted that the observation of the trial court showing the involvement of the applicant in the conspiracy is contrary to the evidence as investigating officer Shri Kishor Bele, vide Exhibit-3151, specifically admitted, as follows:

होम ट्रेड लिमीटेड यांनी सदर रक्कम ही त्यांच्या कार्यालयीन कामकाजात खर्च केली होती व त्यातील काही रक्कम नागपूर जिल्हा मध्यवर्ती सहकारी बॅंकेकडे धनादेशाद्वारे परत केली होती. हे म्हणणे खरे आहे की होम ट्रेड लिमीटेड यांनी त्यांच्या खात्यातील जी काही रक्कम जिथे कुठे पाठविली त्या रकमेशी आरोपी क्र.१ सुनील केदार यांचा काही संबंध दिसून आला नाही. हे म्हणणे खरे आहे की तपासादरम्यान होम ट्रेड लिमीटेड व आरोपी क्र.१ सुनील केदार यांच्यामध्ये इतर काही आर्थिक व्यवहार असल्याचे मला दिसून आले नाही.

The above admission given by the investigating officer sufficiently shows that the applicant has neither invested the amount for his personal gain nor evidence came before the court to show that any amount was transferred either to the applicant or he is anyway concerned with the transfer of that amount. He specifically admitted that during investigation, it does not reveal to him any transaction between him and HTL. He submitted that even if the entire prosecution evidence is taken into consideration, there is absolutely no material to show the involvement of the applicant in the conspiracy. He submitted that as far as observation of the trial court is concerned, that the applicant has violated the circulars of the RBI and NABARD and ignored the certain instructions which are not sufficient to attract the offence of criminal breach of trust. The Honourable Apex Court in the case of **C.Chenga Reddy and ors vs. State of Andhra Pradesh** *supra* observed that the appellants ignored certain other instructions on the subject

cannot lead to an irresistible inference that they did so with dishonest intention. The Honourable Apex Court further observed that the charge of conspiracy must fail. There have been some irregularities committed in the matter of allotment of work to the appellant or breach of codal provisions, circulars and departmental instructions, for preparation of estimates etc. and those irregularities give rise to a strong suspicion in regard to the *bona fides* of the officials of the department and their link with the appellant, but that suspicion cannot be a substitute of proof.

23. Learned Senior Counsel for the applicant submitted that admittedly, at this stage, the appreciation of the evidence is not required and the applicant has to only show that he has arguable points in the appeal and has to show there are chances of acquittal.

24. In the present case also, it is pointed out by the learned counsel of the applicant that the observation of the trial court is contrary to the evidence and judgment flawed by intrinsic evidence. Even, in view of the observation of the Honourable Apex Court, in the case of **Omprakash Sahni vs. Jai Shankar Chaudhary and anr** *supra,* the applicant has shown he has chances of acquittal and if sentence is executed, in view of the

judgment in the case of **Afjal Ansari vs. State of U.P.** *supra*, if sentence is allowed to operate, would lead to irreparable damage and irreversible consequences and, therefore, needs to be suspended. Moreover, the sentence is for the limited period and there are no exceptional circumstances for not suspending sentence.

25. Learned Special Public Prosecutor pointed out the evidence of PW25 RBI Officer and PW14 SEBI Officer, which shows that transaction are carried out with private brokers. The applicant was custodian and entrusted with the property, which is public fund and the same was misappropriated. If the applicant is released on bail by suspending the sentence, wrong message will go in the society.

26. Upon careful consideration of the judgment of the trial court, it appears to me that the impugned judgment suggests that the transactions are entered by the applicant by violating the norms of the RBI and NABARD. The observation of the trial court purchasing the securities by keeping the other directors in dark is contrary to evidence in view of Exhibits-1194 and 1315 which shows that it was brought to the notice of the directors as well as share holders. Secondly, the observation of the trial court, that no step are taken to take

action, is also contrary to the evidence as the applicant has lodged the First Information Report prior to registration of the crime. The specific admission by the investigating officer suggesting no evidence came before him showing any transactions between the applicant and HTL indicates that the observation of the trial court showing his involvement in the conspiracy is contrary to the evidence. Thus, the applicant has made out a case for suspension of sentence pointing out that he has arguable points which are not considered by the trial court.

27. In such circumstances, denying relief and allowing the conviction to operate by executing the sentence, would lead to irreparable damage and the convict cannot be compensated in any monetary terms or otherwise if he is acquitted later on.

28. As far as the submission of learned Special Public Prosecutor for the State, that wrong message will go to the society, considering the submission and the question of relevance of "moral turpitude", which is considered by the Honourable Apex Court in the case of **Afjal Ansari vs. State of U.P.** *supra,* it is held by the Honourable Apex Court that while contemplating to invoke the concept of 'moral turpitude' as a decisive factor in granting or withholding the suspension of

conviction for an individual, there is a resounding imperative to address the issue of depoliticizing criminality. There has been increasing glamour to decriminalize polity and hold elected representatives accountable for their criminal antecedents. It is a hard truth that persons with a criminal background are potential threats to the very idea of democracy, since they often resort to criminal means to succeed in elections and other ventures. It is further observed having said so, we hasten to hold that societal interest is an equally important factor which ought to be zealously protected and preserved by the Courts. The literal construction of a provision such as Section 389(1) of the Code of Criminal Procedure may be beneficial to a convict but not at the cost of legitimate public aspirations. It would thus be appropriate for the Courts to balance the interests of protecting the integrity of the electoral process on one hand, while also ensuring that constituents are not bereft of their right to be represented, merely consequent to a threshold opinion, which is open to further judicial scrutiny. It is therefor imperative to weigh the competent interests presented by both the appellants and the State.

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 the various issues pointed out by learned Senior Counsel for the applicant and in view of the settled position of law, the prayer for suspension of sentence deserves to be considered in view of the observations of the Honourable Apex Court liberally, unless there is any statutory restriction. Even, if the parameters laid down by the Honourable Apex Court, **Omprakash Sahni vs. Jai Shankar Chaudhary and anr** *supra,* are taken into consideration, the applicant has made out a case for suspension of sentence. The

denial of suspension of sentence and allowing to operate can lead to irreparable damage.

31. In this view of the matter, the application deserves to be allowed. Accordingly, I proceed to pass following order:

ORDER

1. The application for suspension of sentence is **allowed**.

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

3. Applicant Sunil Chhatrapal Kedar, be released on bail on his executing a P.R. Bond of Rs.1,00,000/- (Rs. One Lakh) with one solvent surety of the like amount.

4. The applicant shall attend the trial Court on 1st of every month and the trial Court shall record his presence.

5. The applicant shall furnish his cell phone number(s) along with his address proof and names and addresses of his two relatives along with their address proof.

6. The applicant shall not leave the jurisdiction of the appellate court i.e. District and Sessions Court, Nagpur without prior permission of the said Court.

7. The applicant shall not apply for exemption, unless there are exceptional circumstances.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!