Mayuram Subramanian Srinivasan vs C.B.I on 16 June, 2006

Author: Arijit Pasayat

Bench: Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  685 of 2006

PETITIONER:
Mayuram Subramanian Srinivasan

RESPONDENT:
C.B.I

DATE OF JUDGMENT: 16/06/2006

BENCH:
ARIJIT PASAYAT

JUDGMENT:
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J U D G M E N T WITH CRIMINAL APPEAL NOS. 687 OF 2006 AND 688 OF 2006 ARIJIT PASAYAT, J.

When the matter was placed for admission, the office report pointed out that the appellant in each Appeal has not surrendered and therefore in terms of the Supreme Court Rules, 1966 (in short the 'Rules') the Criminal Appeal cannot be taken up. It is pointed out that in each case an application has been filed for staying operation of the impugned judgment and final order dated 12th April, 2006 passed by the Special Court at Bombay constituted under the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992 (in short the 'Act') in Special Case No.4 of 1996 during the pendency of the appeal and to suspend the sentence of the appellant and the fine.

Learned counsel for the appellants submitted that the appeal is under Section 10 of the Act and the learned Judge of the Special Court has suspended the substantive sentence passed against each of the accused for a period of 10 weeks from the date of judgment. For that purpose each of the accused executed fresh RR Bond. Time was granted for execution of the bond. It is case of the appellants that the Rules have no application to the present case, as there is a special provision i.e. Section 9(4) of the Act authorizing the concerned Court to regulate its procedure, adopt such procedure as it may deem fit consistent with the principles of natural justice. In exercise of that power the operation of the sentence has been suspended. It is also pointed out that in several appeals under Section 10 of the Act, this Court has directed suspension of the substantive sentence during the hearing of the appeal subject to furnishing of personal bond and had not required surrender of the accused appellant. Copies of several said orders have been placed on record.

Section 389 of the Code of Criminal Procedure, 1973 (in short the 'Code') permits a Court to suspend the sentence pending the appeal and for release of the appellant on bail.

Section 389 so far as relevant reads as follows :

> 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.
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> 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:
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> 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.".
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> (2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.
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> (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,
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> (i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
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> (ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."

Section 389 (3) has application when there is a right of appeal. Where prayer for grant of certificate of High Court to appeal in this Court in terms of Article 136 of the Constitution of India, 1950 (in short the 'Constitution') or is made under Article 134(A) of the Constitution there is no right of appeal involved. In such cases Section 389(3) has no application. Merely because somebody intends to file application under Article 136 of the Constitution and seek leave to appeal under Article 136 of the Constitution, Section 389(3) of the Code has no application. But the position is different when a case is covered under Article 134(1)(a) or Article 134(1)(b) being covered under Section 2 of the

Supreme Court (Enlargement of Criminal Appeal Jurisdiction) Act, 1970 (in short the 'Enlargement Act'). In Ram Kumar Pande v. The State of Madhya Pradesh (AIR 1975 SC 1252) it was held that no certificate of High Court is required since an order for acquittal had been converted into conviction under Section 302 and life sentence had been imposed. The appeal in such a case was as a matter of right under the Enlargement Act. Similar view was taken in Chandra Mohan Tiwari and Another v. State of Madhya Pradesh (AIR 1992 SC 891). It was held that under Section 379 of the Code which is in line with Article 134 (1((a) & (b) of the Constitution, an appeal lies as of right to this Court in a case where High Court has on appeal reversed the order of acquittal and has convicted and sentence the accused either to death or imprisonment for life or imprisonment for a term of 10 years or more. An appeal under Section 10 of the Act falls to the category of cases where there is a right of appeal.

We are not concerned with the question whether Section 9 of the Act operates in a broader area than Section 389(3) of the Code. Question is whether the accused who prefers a Criminal Appeal though as a matter of right has to first surrender or seek exemption from surrendering. Order XXI Rule 13A of the Rules is relevant in this context. Order XXI deals with Special Leave Petitions in criminal proceedings and Criminal Appeals. Order XXI is a part of Part II of the Rules i.e. Appellate Jurisdiction. Sub part (A) relates to Civil Appeals whereas sub part (B) relates to Criminal Appeals. Rule 13 A of Order XXI reads as follows :

> "Where the appellant has been sentenced to a term of imprisonment, the petition of appeal shall state whether the appellant has surrendered. Where the appellant has not surrendered to the sentence, the appeal shall not be registered, unless the Court, on a written application for the purpose, orders to the contrary. Where the petition of appeal is accompanied by such an application, the application shall first be posted for hearing before the Court for orders."

Rule 13A was introduced by GSR 466 dated 22nd June, 1983 with effect from 2.7.1983.

Order XXI relates to Special Leave Petitions in Criminal proceedings and Criminal Appeals. So far as Special Leave Petitions are concerned, Rule 6 application thereto is in almost identical language as that of Rule 13A. In both cases it is stipulated that unless the petitioner or the appellant as the case may be has surrendered to the sentence, the petition/the appeal shall not be registered and cannot be posted for hearing unless the Court on written application for the purpose, orders to the contrary. In both cases it is stated that where the petition/appeal is accompanied by such an application that application alone shall be posted for hearing before the Court for orders. Therefore, the position is crystal clear that the Criminal Appeal cannot be posted unless proof of surrender has been furnished by the appellant who has been convicted. It appears from the various orders which have been filed by learned counsel for the appellant, the effect of Order XXI Rule 13A has not been dealt with. It may be that the provision was not brought to the notice of the Bench. The requirements of Order XXI Rule 13A are mandatory in character and have to be complied with except when an order is passed for exemption from surrendering.

Learned counsel for the appellant submitted that the Rule cannot be at variance with the provisions of the Act more particularly in view of Section 9(4) of the Act. The stand is without any basis. Under

Section 9(4) of the Act, the Special Court is authorized to formulate its own procedure to be adopted. That cannot do away with the requirement stipulated under Order XXI Rule 13A. The rules have been framed in exercise of powers conferred by Article 145 of the Constitution and all other powers in this behalf, by this Court and the Rules have been made with the approval of the President. Article 145(1) so far as relevant reads as follows:

> "145. Rules of court, etc.--(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from lime to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including--
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> (a) rules as to the persons practising before the Court,
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> (b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
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> (c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;
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> (cc) rules as to the proceedings in the Court under [article 139A];
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> (d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;
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> (e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;
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> (f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;
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> (g) rules as to the granting of bail;
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> (h) rules as to stay of proceedings;
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> (i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;
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> (j) rules as to the procedure for inquiries referred to in clause (1) of Article 317."

As noted above, there is no application made for exemption from surrendering. Significantly, in the orders passed in the appeals referred to by learned counsel for the appellants there is no reference to Order XXI Rule 13A.

The effect of Order XXI Rule 13A of the Rules does not appear to have been brought to the notice of the Court while dealing with the application for stay of the judgment of the High Court in orders on which reliance is placed by learned counsel for the appellants. The consequences which flow from such non reference to applicable provisions have been highlighted by this Court in many cases.

In State through S.P. New Delhi v. Ratan Lal Arora (2004) 4 SCC 590) it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

> "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the 'Constitution') which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC
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> 139). To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. The position was highlighted in Nirmal Jeet Kaur v. State of M.P. (2004 (7) SCC
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> 558).
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> The question was again examined in N. Bhargavan Pillai (dead) by Lrs. And Anr. v. State of Kerala (AIR 2004 SC 2317).

It was observed in para 14 as follows:

> "14- Coming to the plea relating to benefits under the Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance in the accused-appellant's plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda's case (supra) does not even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view, if any, expressed without analysing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal which we direct."

The matter can be looked at from another angle. The Special Court had granted protection for some periods by suspending the sentence. It is the discretion of the Court whether to extend that protection. But that, in our view, would be subject to the provisions of Order XXI Rule 13A. May be that in those cases relied by learned counsel for the appellants the discretion has been exercised by extending the period fixed by the Special Court. But that cannot have any precedent value, more particularly when it is relatable to a mandatory requirement. Though it is the case of learned counsel for the appellant that Order XXI Rule 13A cannot in any way affect the powers available to Special Court under Section 9(4), there is no substance in the plea for the simple reason that Section 9(4) only permits the Special Court to regulate the procedure before it. That in no way authorizes the Special Court to regulate the proceedings before this Court.

In the aforesaid background it is directed that the appeals shall be posted only after the appellants surrender and proof of surrender is filed. Ordered accordingly.