

Pahali Behera Vs. State

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Court : Orissa

Decided On : Jul-04-1996

Reported in : 1996(II)OLR249

Judge : A. Pasayat, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 389(3); [Constitution of India](#) - Article 136

Appeal No. : Misc. Case No. 281 of 1996 (Arising out of Criminal Revision No. 408 of 1994)

Appellant : Pahali Behera

Respondent : State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : A.K. Misra (2), S.K. Misra and M.R. Mohanty

Judgement :

ORDER

A. Pasayat, J.

1. The only question involved in this application is whether the provisions of Section 369(3) of the Code of Criminal Procedure, 1973 (in short, 'the Code') apply

to an application for leave to appeal to the apex Court for grant of leave to prefer appeal.

2. Detailed reference to the factual aspects is unnecessary in view of the fact that the question is a pure question of law. Petitioner was convicted for commission of offence punishable under Section 47 (a) of the Bihar and Orissa Excise Act, 1915 (in short, 'the Excise Act'), and sentenced to undergo six months' rigorous imprisonment and fine of Rs. 500/-, in default to undergo rigorous imprisonment for one month more by the learned Assistant Sessions Judge, Cuttack. The conviction and sentence were maintained by the learned First Additional Sessions Judge, Cuttack. Criminal Revision No. 408 of 1994 decided on 22-12-1995 did not bring any relief to the petitioner.

3. In this application it has been stated that the petitioner has filed an application for leave to appeal to the apex Court and during the pendency of the application he should be granted liberty to be on bail. It is accepted that after the judgment passed by this Court in the criminal revision, the petitioner has been taken to custody. That according to Mr. S.K. Misra, learned counsel for petitioner is not really of no consequence. According to learned counsel for petitioner, the provisions of Section 389(3) of the Code have application to an application to leave to appeal to the Apex Court. It is submitted that the essence of Sub-section (3) of Section 389 is the intention of the convicted person to present an appeal. Section 389 of the Code forms part of Chapter XIX dealing with appeals, and therefore, it applies to an application for leave which is manifestation of the intention.

Mr. N. Prusty, learned counsel for State submitted that the said provisions have no application. An application for leave to appeal before the apex. Court is not governed by the Code and is governed by Articles 134 and 136 of the [Constitution of India](#). Sub-section (3) of Section 389 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 appeal and obtain orders of the appellate Court under Sub-section (1). At this juncture it is required to take note of Section 426 of the Code of

Criminal Procedure, 1898 (in short, 'the old Code'). Sub-section (2-A) of Section 426 of the old Code read as follows :

'(2-A). When any person other than a person convicted of a non-bailable offence is sentenced to imprisonment by a Court and appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him 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.'

4. A convicted person has no right of appeal to Apex Court. He can only move the apex Court for special leave to appeal under Article 136 of the Constitution. Learned counsel for the petitioner submits 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. Strong reliance is placed on a decision of the Kerala High Court in *Abdulla Haji v. Food Inspector* : 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 apex Court for special leave to appeal and when special leave is granted it can be said that there is an appeal by him. Order XXI of the Supreme Court Rules, 1966 deals with special leave petitions in criminal proceedings and criminal appeals. Rule 9 states that on the granting of special leave, the petition for special leave shall be treated as a petition for appeal and shall be registered and numbered as such. This would mean that apart from filing a special leave petition no separate memorandum of appeal is necessary. In *Arunachalam v. P.S.R. Setharathnam* : AIR 1979 SC 1284, it was observed that 'after leave appeal is born'. From this it does not follow that what a person originally presents as 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 leaving being granted, is treated as an appeal. He has to satisfy the apex Court that it is a fit case for grant of special leave and then only urge his appeal before the Court.

Power under Article 136 is a discretionary and extraordinary power outside the purview of ordinary law and has no resemblance to an ordinary appellate power. The apex Court exercising jurisdiction under Article 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'.

5. Section 415 of the Code deals with postponement of execution of sentence of death in case of appeal to the Supreme Court. Sub-section (1) states that where a person is sentenced to death by the High Court and an appeal from its judgment lies to the Supreme Court under Article 136(1) (a) or (b) of the Constitution, the High Court shall order the execution of sentence to be postponed until the period allowed for preferring such appeal has been expired or if an appeal is preferred within that period, until such appeal is disposed of. Sub-section (2) states that where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under Article 132 or under Article 134(1)(c) of the Constitution, the High Court shall order the execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired. Sub-section (3) states that where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under Article 136 of the Constitution, High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition. There is no provision similar to Section 415 to deal with sentences other than death sentence, for postponement/suspension of execution of sentence.

6. My attention has been invited to certain provisions of the Supreme Court Rules which contemplate an appellant before the Supreme Court or person filing special leave petition to surrender to sentence. Rule 6 of Order XXI of the Rules states that where the petitioner has been sentenced to a term of imprisonment, the petition shall state whether the petitioner has surrendered. Where the petitioner has not surrendered to suffer the sentence, the petition shall not be posted for

hearing unless the apex Court, on a written application for the purpose, orders to the contrary. Where the petition is accompanied by such an application, the application and the petition shall, be posted together before the Court. Rule 134 contains a similar provision in regard to appeals before the Supreme Court. Thus, ordinarily, a person filing an appeal or special leave petition before the Supreme Court is required to surrender to suffer the sentence, though it is open to the Supreme Court to pass an order to the contrary. The appeal and the special leave petition will be held up till he surrenders to suffer sentence, or the Court orders to the contrary. The rules are framed under Article 145 of the Constitution, and they throw beacon light in interpreting Sub-section (3) of Section 389 of the Code. If a person approaching the Supreme Court is mandatorily required to surrender to suffer the sentence unless the Supreme Court directs otherwise, it would be incongruous to take the view that the High Court can give him bail to 'afford sufficient time' not only to present an appeal but also to obtain orders of the Court.

7. Article 136 of the Constitution under which leave is sought for preferring appeal does not confer on any party a right of appeal nor for such a matter the Supreme Court is a regular Court of Appeal which can be approached by the accused person as of right and, therefore, the petitioner who has either presented appeal under Article 136 of the [Constitution of India](#) or intends to file application for special leave to file appeal from the conviction and sentence before the Supreme Court cannot avail the benefit of Sub-section (3) of Section 389 of the Code. Since while exercising jurisdiction under Article 136 Supreme Court is a regular Court of Appeal, it cannot be termed as an appellate Court within the meaning of Sub-Section (1) of Section 389 of the Code, and therefore, the convicted person is not entitled to the benefit of Sub-section (3) of Section 389. A person can be said to intend to present appeal only when he has right to present appeal, i.e., he has right of appeal. Similar view has been expressed by a Full Bench of Kerala High Court in *Manmooty and Ors. v. Food Inspector and Ors.* : AIR 1987 Kerala 270 (which overruled the view taken in *Abdulla Maji's case* (supra), and the Karnataka High Court in *D. Subhaiah v. The State of Karnataka* : 1992 Cr LJ 3740.

8. The inevitable conclusion, therefore, is that a person who has filed or intends to file special leave application is not entitled to the benefit of Sub-section (3) of

Section 389 of the Code, as an appeal is born after leave is granted, as was stated by the apex Court in Arunachalam's case (supra).

The application is not entertained, and is disposed of accordingly.

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