A VIVEK RAI & ANR.

v.

HIGH COURT OF JHARKHAND THROUGH REGISTRAR GENERAL & ORS.

(Writ Petition (Criminal) No.61 of 2012)

B FEBRAURY 04, 2015

[T.S. THAKUR AND ADARSH KUMAR GOEL, JJ.]

High Court of Jharkhand Rules, 2001 – r. 159 – r. 159 C *requiring the accused to surrender to the custody of the court before filing revision petition – Constitutional validity of – Held: Rule does not suffer from any infirmity – The general practice is that a revision against conviction and sentence is filed after an appeal is dismissed and the convicted person is taken* D *into custody in Court itself – Object of the Rule is to ensure that a person who has been convicted by two courts obeys the law and does not abscond – Provision cannot thus, be held to be arbitrary in any manner – Provision is to regulate the procedure of the Court and does not, in any manner, conflict* E *with the substantive provisions of the Cr.P.C. – Similar provision exists in the Supreme Court Rules, 1966 – Rule does not affect the inherent power of the High Court to exempt the requirement of surrender in exceptional situations – Constitution of India, 1950 – Arts. 14, 21, 32 – Code of* F *Criminal Procedure, 1973 – ss. 397, 401.*

Mahadeo Prasad Shrivastav vs. High Court of Jharkhand **2004 Crl.L.J.4392;** *Mayuram Subramanian Srinivasan vs. C.B.I.* **2006 (3) Suppl. SCR 48:2006 (5) SCC 752;** *K.M. Nanavti vs. State of Bombay* **(1961) 1 SCR 497 – referred** G **to.**

Case Law Reference :

2004 Crl.L.J.4392	**Referred to**	**Para 3**

H

2006 (3) Suppl. SCR 48 Referred to Para 3, 6 A

(1961) 1 SCR 497 Referred to Para 4

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 61 of 2012.

B

Under Article 32 of the Constitution of India.

M. R. Calla, Siddharth Luthra, Rohan Thawani, Pooja Dheer, Prgati Neekhra, Ambhoj Kumar Sinha, Pratiksha Sharma, Ankit Acharya, Nanita Sharma, Arijit Hazumdan, Abhinav Mukherjee for the Appearing Parties. C

The Judgment of the Court was delivered by

ADARSH KUMAR GOEL, J. 1. This writ petition has been filed under Article 32 of the Constitution of India seeking to declare Rule 159 of the High Court of Jharkhand Rules, 2001 as violative of Articles 14 and 21 of the Constitution and provisions of Sections 397 and 401 of the Code of Criminal Procedure, 1973 ("Cr.P.C."). The rule in question is as follows: D

> *"In the case of revision under Sections 397 and 401 of the Code of Criminal Procedure, 1973 arising out of conviction and sentence of imprisonment, the petitioner shall state whether the petition shall be accompanied by a certified copy of the relevant order. If he has not surrendered the petition shall be accompanied by an application seeking leave to surrender within a specified period. On sufficient cause if shown, the Bench may grant such time and on such conditions as it thinks and proper. No such revision shall be posted for admission unless the petitioner has surrendered to custody in the concerned Court."* E F G

2. Case of the petitioners is that they have been convicted and sentenced under Section 498-A of the Indian Penal Code ("IPC") and Sections 3 and 4 of the Dowry Prohibition Act. H

A Against the said conviction and sentence, their appeal has been dismissed and revision petition was filed before the High Court but the same was not registered on account of impugned Rule 159 as they failed to surrender to custody. It is submitted that this Rule is in conflict with the provisions of Criminal B Procedure Code dealing with the statutory revisional jurisdiction of the High Court and even in a fit case, the High Court cannot consider the revision petition and grant bail unless a convicted person covered by the Rules surrenders to custody. The Rule being subordinate legislation could not militate against C the substantive statutory provision. Since the Division Bench of the High Court has upheld the validity of the Rule and the special leave petition was dismissed by this Court against the said judgment, the petitioners have no other remedy except to approach this Court under Article 32 as their fundamental rights D under Articles 14 and 21 are affected.

3. A counter affidavit has been filed by the Registrar General of the High Court of Jharkhand opposing the prayer for declaring the Rule to be *ultra vires*. Reliance has been placed on the judgment of the Division Bench of the High Court E in *Mahadeo Prasad Shrivastav* vs. *High Court of Jharkhand* laying down that the Rule could not be held to be arbitrary, discriminatory or illegal. Special Leave Petition (Crl.) No.4890 of 2004 filed against the said judgment was dismissed by this Court. It has also been stated that there is an identical provision F in Order XXI, Rule 6 of the Supreme Court Rules, 1966 and thus such a provision cannot be held to be arbitrary nor such a provision, in any manner, be held to be inconsistent with Section 389 read with Sections 397 and 401 Cr.P.C. The High Court is competent to frame Rules to regulate its procedure. Reliance G has also been placed on a Judgment of this Court in *Mayuram Subramanian Srinivasan vs. C.B.I.* laying down that a convicted person is required to surrender under Rule 6 of Order XXI of the Supreme Court Rules, 1966, unless the Court directs otherwise.

H

3. We have given due consideration to the rival submissions. A

4. We do not find any merit in the challenge to the validity of the Rule. It is well known practice that generally a revision against conviction and sentence is filed after an appeal is dismissed and the convicted person is taken into custody in Court itself. The object of the Rule is to ensure that a person who has been convicted by two courts obeys the law and does not abscond. The provision cannot thus be held to be arbitrary in any manner. The provision is to regulate the procedure of the Court and does not, in any manner, conflict with the substantive provisions of the Cr.P.C. relied upon by the petitioners. A similar provision exists in the Supreme Court Rules, 1966. In *K.M. Nanavti* vs. *State of Bombay* this Court considered the scope and effect of identical provision of Order XXI Rule 5 of the Supreme Court Rules, then applicable, which read as follows : B C D

> *"When the petitioner has been sentenced to a term of imprisonment, the petition shall state whether the petitioner has surrendered. Unless the court otherwise orders, the petition shall not be posted for hearing until the petitioner has surrendered to his sentence".* E

5. It was observed that the Rule only crystalised the pre-existing practice of this Court and the High Courts. Further, question considered was whether the Rule violated Article 161 which conferred power on Governor to suspend the sentence as in that case, the Governor had suspended the sentence but still the convict was required under the Rule to surrender. This Court held that power of the Governor could not regulate procedure of the Court and if the case was to be heard by this Court, unless this Court granted exemption, the Rule prevailed. We are not concerned with the said question in the present case. Relevant observations in the said judgment are : F G

> *".....This Rule was, in terms, introduced into the* H

Supreme Court Rules last year and it only crystallized the preexisting practice of this court, which is also the practice in the High Courts. That practice is based on the very sound principle which was recognised long ago by the Full Bench of the High Court of Judicature, North Western Provinces, in 1870, in the case of The Queen v. Bisheshar Pershad [Vol.2 NWP High Court Reports, p. 441]. In that case no order of conviction had been passed. Only a warrant had been issued against the accused and as the war rant had been returned unserved a proclamation had been issued and attachment of the property of the accused had been ordered, with a view to compelling him to surrender. The validity of the warrant had been challenged before the High Court. The High Court refused to entertain his petition until he had surrendered because he was deemed to be in contempt of a lawfully constituted authority. The accused person in pursuance of the order of the High Court surrendered and after he had surrendered, the matter was dealt with by the High Court on its merits. But as observed above the Rules framed under Article 145 are only in aid of the powers of this court under Article 142 and the main question that falls for consideration is, whether the order of suspension passed by the Governor under Article 161 could operate when this court had been moved for granting special leave to appeal from the judgment and order of the High Court. As soon as the petitioner put in a petition for special leave to appeal the matter became sub judice in this court. This court under its Rules could insist upon the petitioner surrendering to his sentence as a condition precedent to his being heard by this court, though this court could dispense with and in a proper case could exempt him from the operation of that Rule. It is not disputed that this court has the power to stay the execution of the sentence and to grant bail pending the disposal of the application for special leave to appeal. Rule 28 of Order 21 of the Rules does not cover that

period, but even so the power of the court under Article 142 of the Constitution to make such order as is necessary for doing complete justice in this case was not disputed and it would be open to this court even while an application for special leave is pending to grant bail under the powers it has under Article 142 to pass any order in any matter which is necessary for doing complete justice."

6. Again in *Mayuram Subramanian Srinivasan* ***(supra),*** validity and effect of identical Rules i.e. Rules 6 and 13-A of Order XXI of Supreme Court Rules, 1966 was considered. It was observed :

*"**7.** Order 21 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 13-A. 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 21 Rule 13-A has not been dealt with. It may be that the provision was not brought to the notice of the Bench. The requirements of Order 21 Rule 13-A are mandatory in character and have to be complied with except when an order is passed for exemption from surrendering."*

7.In concurring judgment, it was observed :

"16. It has been submitted that the statutory provisions of Section 389(3) CrPC have an overriding effect over the Supreme Court Rules and hence once bail has been granted to a convicted person by the trial court, this Court cannot insist that he should surrender to the sentence in terms of Rule 13-A before his appeal can be registered.

17. While such a submission is attractive, it does not stand scrutiny for the simple reason that sub-section (3) of Section 389 CrPC empowers the trial court to release a convicted person on bail for such period as will afford him sufficient time to present an appeal and obtain orders of the appellate court under sub-section (1), namely, release on bail, and it is only for such period that the sentence of imprisonment shall be deemed to be suspended.

18. The basic fallacy of Ms Jaiswal's submission is that it overlooks the question that grant of bail in the appeal presupposes surrender by the convicted person.

19. The provisions of Section 389 CrPC and that of the Supreme Court Rules, 1966 are independent provisions and will have to be considered on their own standing."

8. Only further submission put forward is that inherent power of the Court to direct listing of the case by exempting the requirement of surrender has been taken away. It is pointed out that even in Supreme Court Rules prohibition against listing without surrender is not applicable if the Court otherwise directs. Such exception is not to be found in the impugned Rule.

9. It has not been disputed even by the learned counsel for the High Court that the Rule does not affect the inherent power of the High Court to exempt the requirement of surrender in exceptional situations. It cannot thus, be argued that prohibition against posting of a revision petition for admission

applies even to a situation where on an application of the petitioner, on a case being made out, the Court, in exercise of its inherent power, considers it appropriate to grant exemption from surrender having regard to the nature and circumstances of a case. Thus, the exception as found in corresponding Supreme Court Rules that if the Court grants exemption from surrender and directs listing of a case, the Rule cannot stand in the way of the Court's exercise of such jurisdiction, has to be assumed in the impugned Rule. A B

10. In these circumstances, we do not find any ground to hold that the impugned Rule suffers from any infirmity. The writ petition is accordingly, dismissed. C

Nidhi Jain

Writ Petition dismissed.