

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

Tuesday, the 3rd day of October 2023 / 11th Aswina, 1945

CRL.M.APPL.NO.1/2023 IN CRL.A NO. 49 OF 2023

SC 1/2017 OF SESSIONS COURT, KAVARATHY, UNION TERRITORY OF LAKSHADWEEP
PETITIONERS/PETITIONERS:

1. SAYED MOHAMMED NOORUL AMEER, AGED 43 YEARS, S/O. POOKOYA THANGAL PADIPURA HOUSE, ANDROTH ISLAND, LAKSHADWEEP, - 682551
2. MOHAMMED FAIZAL, AGED 40 YEARS ,S/O. POOKOYA THANGAL PADIPURA HOUSE, ANDROTH ISLAND, LAKSHADWEEP, - 682551
3. MOHAMMED HUSSAIN THANGAL, AGED 54 YEARS ,S/O. A.B. POOKOYA THANGAL, PADIPURA HOUSE, ANDROTH ISLAND, LAKSHADWEEP, - 682551
4. MOHAMMED BASHEER THANGAL, AGED 52 YERAS, S/O. KOYA THANGAL, SHEKKIRIYAMMADA HOUSE, ANDROTH ISLAND, LAKSHADWEEP, - 682551

RESPONDENTS/RESPONDENTS:

1. U.T.ADMINISTRATION OF LAKSHADWEEP REPRESENTED BY THE ITS STANDING COUNSEL, HIGH COURT OF KERALA, ERNAKULAM - 682031
2. ADDITIONAL 2ND RESPONDENT PADANATH MOHAMMED SALI, H AGED 54 YEARS S/O UMMADAPURA ATTAKOYA, PADANATH HOUSE, MECHERY, ANDROTH ISLAND, UNION TERRITORY OF LAKSHADWEEP -682551, IMPLEADED AS PER ORDER DATED 20.01.2023 IN CRL.M.A.4/2023

Application praying that in the circumstances stated therein the High Court be pleased to suspend the conviction as well as the sentence passed in S.C.1/2017 of the Court of Session ,Kavaratti ,Union Territory of Lakshadweep in Cr.No.08/2009 & Cr.No 10/2009 of Androth Police Station in C.P.No.01/2016 of the Judicial First -Class Magistrate ,Androth and release the petitioners on bail in the interest of justice.

This Application again coming on for orders upon perusing the application and this court's order dated 25.01.2023 therein and upon hearing the arguments of M/S. P.VIJAYA BHANU (SR.), V.S.THOSHIN, SATHEESH MOHANAN, P.A.MEERA, SREEJITH S. NAIR, COLIN ANTONY DCRUZ, SEK HAR G. THAMPI, GIRISANKAR JYOTHIKUMAR SHEENA, RESHMA M.S, NIKITA J. MENDEZ, SRUTHY N. BHAT, SASTHAMANGALAM S. AJITHKUMAR, Advocates for the petitioners and of M/S. A.R.L.SUNDARESAN, ASSISTANT SOLICITOR GENERAL OF INDIA, ,S.MANU, DEPUTY SOLICITOR GENERAL OF INDIA ,SAJITHKUMAR.V for respondent 1, M/S.B.RAMAN PILLAI(Sr.),AJIT G ANJARLEKAR, G.P.SHINOD, GOVIND PADMANAABHAN, ATUL MATHEWS, GAYATHRI S.B., . Advocates for the Additional respondent 2, the court passed the following:

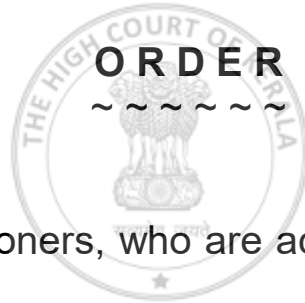
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N. NAGARESH, J.

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Crl. M.A. No.1 of 2023
in
Criminal Appeal No.49 of 2023
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Dated this the 3rd day of October, 2023



The petitioners, who are accused Nos.1 to 4 in SC No.1/2017 on the files of the Court of Sessions, Kavarathi, were found guilty of the offences punishable under Sections 143, 147, 148, 448, 427, 324, 342, 307 and 506 read with Section 148 IPC and are convicted and sentenced to undergo rigorous imprisonment for various periods, the rigorous imprisonment for 10 years awarded under Section 307 read with Section 149 IPC being the longest period of sentence.

2. This Court admitted Criminal Appeal No.49 of 2023 filed by the petitioners/accused. In Crl.M.Appl. No.1/2023

filed by the petitioners/accused for suspension of conviction and sentence, a learned Single Judge of this Court, for the reasons recorded in the order dated 25.01.2023, took a view that the case of the 2nd petitioner/2nd accused falls within the category of rare and exceptional circumstances, that the ramifications of not suspending the conviction of the 2nd petitioner are enormous and hence the conviction and sentence imposed upon the 2nd accused should be suspended until disposal of the appeal.

3. The U.T. Administration of Lakshadweep filed SLP (Crl.) No.1644 of 2023 invoking Article 136 of the Constitution of India. The Hon'ble Apex Court granted special leave to appeal. The Appeal was numbered as Criminal Appeal No.2501 of 2023. After considering the submissions made on behalf of either side, the Apex Court held as follows:

We have considered these particular submissions in light of the impugned order, bearing in mind the position of law on the aspect of the stay of conviction of a person who has been convicted for certain offences.

It is not in dispute that the first respondent herein is a Member of Parliament representing the constituency of the Union Territory of Lakshadweep and has had the benefit of the order of stay of conviction passed by the High Court. However, we find that the High Court has not considered the position of law in its entirety as it emerges on the basis of judgments that have been rendered by this Court with regard to the manner in which an application seeking a stay of conviction has to be considered. We also find that the High Court has considered only one aspect of the matter, namely, that the first respondent herein being a Member of the Parliament and a representative of his constituency, any order of suspension of membership which is consequential upon conviction would cause a fresh election to be conducted in so far as the Union Territory of Lakshadweep is concerned which would result in enormous expenses. We find that the said aspect need not have been the only aspect which should have weighed with the High Court.

We find that the High Court ought to have considered the application seeking the suspension of conviction in its proper perspective covering all aspects bearing in mind the relevant judgments rendered by this Court and in accordance with law.

On this short ground alone, we set aside the impugned order and remand the matter to the High Court for reconsideration of the application filed by the first respondent herein seeking suspension of conviction.

The Hon'ble Apex Court further observed that all contentions raised between the parties are kept open to be raised before this Court and all observations made in the Order are only for the purpose of disposing of the appeal and remanding the

matter for fresh consideration of the application for suspension of conviction.

4. The Senior Counsel Sri. Kapil Sibal assisted by Sri.Sasthamangalam S. Ajithkumar, the counsel for the petitioners/appellants, urged that there is no impediment for the appellate court to suspend the order of conviction and that an order of conviction can be suspended taking into consideration the nature of the controversy and impact of an order of conviction on the person. Wherever the consequence of an order of conviction is irreversible, the court has to consider the question of suspension of order of conviction.

5. Relying on the judgment of the Apex Court in ***Rama Narang v. Ramesh Narang and others*** [(1995) 2 SCC 513], the Senior Counsel submitted that in certain situations, the order of conviction can be executable, in the sense, it may incur a disqualification. In such cases, the power under Section 389(1) Cr.P.C. to suspend order of conviction can be invoked. If the order of conviction is to

result in some disqualifications, then there is no reason why Section 389(1) Cr.P.C. should be given a narrow meaning to debar the court from granting an order suspending conviction. The Senior Counsel argued that in a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted persons do not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone. In the case of the 2nd petitioner, who is a Member of Parliament, the order of conviction would disqualify him from continuing as Member of Parliament. It would not only affect the right of the 2nd petitioner but the right of the electorate also. While considering the question of suspension of order of conviction, irreversibility of the situation is the most important factor to be taken note of.

6. Relying on the judgment of the Apex Court in **Sareen v. CBI [(2001) 6 SCC 584]**, the Senior Counsel argued that the court has a duty to look at all aspects

including ramifications of keeping such conviction. Though the power to suspend an order of conviction is not alien to Section 389(1) Cr.P.C., its exercise should be limited to very exceptional cases. In **Sareen** (supra), the Apex Court has noted the judgment in **Rama Narang** (supra). This Court will have to take note of the damage which cannot be undone if order of conviction is not suspended. This Court has to take into account the irreversibility of the situation.

7. The Senior Counsel also relied on the judgment in **State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar** [(2012) 12 SCC 84] and argued that the appellate court, for the purpose of considering the question of suspension of order of conviction, shall consider the evil that is likely to befall on the 2nd petitioner, if the conviction is not suspended. In **State of Rajasthan v. Salman Salim Khan** [(2015) 15 SCC 666], the Apex Court has held that it would be open to the respondent to show that if the order of conviction is not stayed, it will cause irreversible consequences/injustice to

him which cannot be undone if he ultimately succeeds.

8. The Senior Counsel also took this Court through the judgment of the Apex Court in ***Lok Prahari through its General Secretary S.N. Sukla v. Election Commission of India and others [(2018) 18 SCC 114]***, ***Ravikant S. Pateel v. Sarvabhuma S. Bagali [(2007) 1 SCC 673]*** to underline the afore legal propositions.

9. On the facts of the case, the Senior Counsel pointed out that there are no independent witnesses in the case to sustain a conviction. The Doctor who examined the injured has given evidence that the injuries sustained are simple. It has come out in evidence that the injuries sustained were by blunt side of the weapon. No recovery of weapon was made. The injured has improved his statements in evidence. The FIR does not indicate of using iron rod for causing injuries whereas the injured has stated in the court that iron rod was used.

10. The Senior Counsel further pointed out that the judgment of the court below impugned in the appeal cannot

stand on its own. A cross case was filed after the original case. The incident in the case and cross case happened on the same day and within close proximity of place and time. In the original case, PW1 was sentenced to undergo one year imprisonment. As the instance is clearly of a case and counter case, the trial court should have heard the two cases together, failure of which has resulted in grave injustice. Taking into consideration the fragility of the impugned judgment and irreparable damage that may fall on the 2nd petitioner which cannot be undone at a later point of time, the order of conviction against the 2nd petitioner is liable to be suspended, urged the Senior Counsel.

11. The Additional Solicitor General of India Mr.A.R.L.Sundaresan entered appearance at the instance of the Deputy Solicitor General representing the 1st respondent. The learned ASGI pointed out that the incident took place on 16.04.2009 at 5.30 pm and the injured were taken to Government Hospital. PW1 had to be taken from the Island to the Mainland for treatment. The evidence adduced in the

case, especially that of PW1, PW8 and PW16, would show that the petitioners are guilty of the offences alleged.

12. The learned ASGI submitted that the irreversible consequences arising from not suspending an order of conviction by itself cannot be a reason to suspend an order of conviction. Elected legislators cannot be treated differently from ordinary citizens. This is clear from the judgment of the Apex Court in ***Lily Thomas and another v. Union of India and others*** [(2013) 7 SCC 653].

13. The purpose of Section 8 of the Representation of the People Act, 1951 is to disqualify a legislator who is convicted. It is a statutory disqualification by operation of law. Section 8(3) is intended for decriminalisation of the legislatures. The provision is intended to maintain purity in public life. Relying on the judgment in ***Sareen*** (supra), the learned ASGI submitted that the Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. The ramification is only one of the factors to be considered. If orders of conviction imposed by

competent criminal courts are suspended taking note only of ramifications, the public confidence will erode, as criminals will continue to act as Members of Parliament and Members of Legislative Assembly. The petition for suspension of order of conviction filed by the petitioners/appellants is therefore liable to be rejected.

14. The Deputy Solicitor General of India Sri. S. Manu pointed out that the judgment of the Apex Court in **Rama Narang** (supra) was one related to proceedings under the Companies Act and the said judgment cannot be taken as one finally deciding the scope of Section 389 Cr.P.C. As regards the argument of case and counter case, the DSGI pointed out that the time of occurrence, the place of occurrence and the witnesses in both the incidents are different and hence the case in question cannot be treated as a counter blast. The petitioners had never put forth a case that the case against them is a counter case, either during trial or immediately thereafter. Therefore, the petitioners cannot be permitted to advance that argument for

the first time in the appeal before this Court.

15. The Senior Counsel Sri. Raman Pillai entered appearance assisted by Sri.Ajit G. Anjarlekar, the counsel for the additional 2nd respondent. The Senior Counsel submitted that the argument of the petitioners that the injuries suffered are simple and therefore Section 307 IPC is not attracted, cannot be accepted. It is the intention of the accused which is relevant. The intention of accused cannot be ascertained based on the injuries suffered. PW1 was found in an injured state by the Circle Inspector. It is the police officials who took PW1 to the Community Hospital. The medical evidence adduced in the case corroborated the version of PW1.

16. The Senior Counsel pointed out that PW1 had to be treated for 14 days in hospital consequent to the attack made by the petitioners. Even when PW1 was discharged from hospital, the injuries were not fully healed. This has come out in evidence. The Senior Counsel further pointed out that the petitioners are involved in as many as four criminal cases. Therefore, this is not a fit case where this

Court should suspend the order of conviction.

17. Before considering the factual background in which the petitioners are convicted by the Court of Sessions, the arguments raised on behalf of the petitioners and the respondents and the sustainability of the prayer of the petitioners for suspension of conviction, it is necessary to look into the law relating to suspension of order of conviction as contained in Section 389 of the Code of Criminal Procedure and as explained by the Hon'ble Apex Court through various judgments.

18. Section 389 of the Code of Criminal Procedure reads as follows:

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.

(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 a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years; or

(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.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

It is clear from Section 389 Cr.P.C. that what can be suspended in exercise of Section 389 Cr.P.C. is an order of

sentence or an order which is executable. An order of conviction by itself is not capable of execution under the Cr.P.C.

19. In the judgment in **Rama Narang** (supra), the Hon'ble Apex Court held that in certain situations, the order of conviction can be executable, in the sense, it may result in incurring a disqualification under a different statute. In such a case, the power under Section 389(1) Cr.P.C could be invoked. In such a situation, the attention of the appellate court must be specifically invited to the consequence that is to likely to fall to enable it to apply its mind to the issue since under Section 389(1), it is under an obligation to support its order 'for reasons to be recorded by it in writing'.

20. The Apex Court in **Rama Narang** (supra) further held that in a fit case, if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done

cannot be undone.

21. The 2nd petitioner is a sitting Member of Parliament (MP) and the conviction in the criminal proceedings would invite disqualification to hold the office of MP under Section 8 of the Representation of the People Act, 1951. The petitioners would submit that hardly nine months are left for General Elections to the Parliament and if the 2nd petitioner is disqualified now, the damage which would result will not be one which can be undone. The question then is whether an Accused in a criminal case is entitled to get the order of conviction suspended whenever and wherever the order of conviction would result in damage which cannot be undone.

22. In the judgment in ***Rama Narang*** (supra) itself, the Hon'ble Apex Court has held that while granting a stay of suspension of the order of conviction, the Court must examine the pros and cons of the case and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers appropriate, impose such conditions as are considered appropriate.

23. The Hon'ble Apex Court considered the issue again in **Sareen** (supra), which was a case relating to conviction on corruption charges. The Apex Court held as follows:

11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, de hors the sentence of imprisonment as a sequel thereto, is a different matter.

The judgment would indicate that ramifications of keeping conviction in abeyance is not the only relevant factor and the

Court has a duty to look into other aspects of the case. In **Sareen** (supra), the Apex Court considered the aspect of proliferation of corrupt public servants and the impairment of morale of other public servants manning such office, to hold against suspension of order of conviction.

24. Again, in **State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar** [(2012) 12 SCC 384], which was also a case of conviction under the Prevention of Corruption Act, 1988, the Apex Court, after considering the judgments in **Navjot Singh Sidhu v. State of Punjab and another** [(2007) 2 SCC 574], **State of Punjab v. Navraj Singh** [(2008) 11 SCC 71] and in **CBI, New Delhi v. Roshan Lal Saini** [AIR 2009 SC 755], held that the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which the applicant must satisfy the Court as regards the evil that is likely to befall on him if the said conviction is not suspended and that stay of

conviction must be granted only in a rare case and that too, only under special circumstances.

25. In ***State of Rajasthan v. Salman Salim Khan*** [(2015) 15 SCC 666] where conviction was under the Wildlife (Protection) Act, 1972, the accused urged that due to the order of conviction, a foreign country is not granting permission to the accused to visit the said country. The Apex Court held that if an order of conviction is in any manner causing irreversible consequences or injustice to the convict, it was open to the court to consider grant of stay on conviction.

26. In ***Lily Thomas and another*** (supra) which was a Public Interest Litigation filed challenging the power of the Parliament to enact Section 8(4) of the Representation of the People Act, 1951 postponing the disqualification of convicted Members of Parliament / State Legislative Assembly, the Hon'ble Apex Court disagreed with the proposition that a sitting Member of Parliament or the State Legislature who suffers from a frivolous conviction by the trial court for an

offence given under sub-sections (1), (2) or (3) of Section 8 of the Representation of the People Act, 1951 will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of Section (4).

27. The Apex Court held that the appellate court under Section 389 Cr.P.C. and the High Courts under Section 482 of the Code can also stay the conviction. While holding so, the Apex Court quoted with approval the judgment in ***Ravikant S. Patil v. Sarvabhuma S. Bagali*** [(2007) 1 SCC 673] in which it was clarified that an order granting stay of conviction is not the rule but an exception to be resorted to in rare cases depending upon the facts of a case.

28. In the order dated 04.08.2023 in ***Rahul Gandhi v. Purnesh Ishwarbhai Modi and another*** [2023 SCC OnLine 929] though the Apex Court held that the ramification of sub-section (3) of Section 8 of the Act are wide ranging affecting the right of the electorate who have elected the Member to

represent their constituency, the relief of interim stay of the order of conviction was granted particularly taking into consideration the fact that no reasons have been given by the Trial Judge for imposing the maximum sentence which has the effect of incurring disqualification under Section 8(3) of the Act.

29. Taking into consideration the precedents laid down by the Hon'ble Apex Court in the afore judgments, the following propositions emerge:

(1) Appellate Court can suspend order of conviction in exercise of the powers under Section 389(1) Cr.P.C. in a fit case, if the appellate court finds that the case is frivolous.

(2) If the appellate court feels satisfied that an order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may suspend the order of conviction in cases where damage done cannot be undone. However, even in such cases, the court has a duty to look into all other aspects of the case.

(3) The stay on conviction must be granted only in rare cases and that too only under special circumstances.

30. In the conspectus of the law as laid down by the Hon'ble Apex Court in this regard, we have to examine the case of the 2nd petitioner. The 2nd petitioner is involved in three other criminal cases though those cases have not resulted in conviction so far. The incident/assault occurred on 16.04.2009 was in connection with General Elections. PWs 1 to 4, who are eye witnesses to the incident, have deposed that the 2nd petitioner hit PW1 using iron rod. PW1 was taken to the nearby hospital by the Circle Inspector of Police. PW1 had to be taken to a hospital in Mainland in a Helicopter for treatment where he remained as in-patient for 14 days. The 2nd petitioner is a Member of Parliament.

31. Criminalisation of election process is of grave concern in our democratic polity. The tentacles of political crimes and criminalisation of election process have started grappling free and fair elections. Incidents of criminal acts being committed even during meeting of legislative bodies

are surfacing. Proliferation of crime in election process could garner momentum to cripple Indian democracy, if men with criminal background are allowed to continue to be part of the democratic system. If persons with criminal antecedents are permitted to continue as Members of Parliament / Legislatures even after conviction by a competent court, that would only send wrong signals to public at large.

32. In view of the law laid down by the Hon'ble Apex Court on suspension of order of conviction, the criteria and threshold limit for grant of suspension of sentence and the criteria and threshold limit for grant of suspension of order of conviction cannot be the same.

33. In these criminal proceedings, PW1 injured has deposed that the 1st accused has hit him on the back of his head with a chopper and the 2nd accused hit on the back of his head with an iron rod and the other persons in the gang hit all over his body. When PW1 ran to a nearby house, accused 1 to 3 kicked and broke open the door of the house and pulled down PW1 and started beating him. After the

incident, PW1 had to be airlifted to Specialist Hospital, Ernakulam and he was in ICU and was inpatient for 14 days. According to the PW1, he required domiciliary hospitalisation for more than six months. PW2 also deposed the role of the accused in the incident in similar lines. PW3 has stated that he saw the 2nd accused hitting the head of PW1 with iron rod. The depositions of PW1 to PW3 give *prima facie* evidence of the overt acts committed by the 2nd accused.

34. One circumstance projected by the petitioners as vitiating the conviction is the absence of joint trial of case and counter case. The two events appear to have occurred at different places and at different point of time. The injured in the alleged original case has no connection with the counter case. The petitioners have not raised the issue of joint trial before the conclusion of trial in SC No.1/2017.

35. Another issue projected by the petitioners is that injuries inflicted are simple and not serious and hence conviction cannot be sustained. On the face of the evidence adduced, PW8 Doctor has deposed that if due medical

attention was not provided, the injuries noted in Ext.P5 are sufficient in the ordinary course to cause death of the patient. Furthermore, it is not essential that bodily injury capable of causing death should have been inflicted, in order that a charge under Section 307 IPC is made out. It is enough if there is an intention coupled with some common act in execution thereof.

As there are materials *prima facie* evidencing the criminal acts on the part of the accused, I am of the firm view that this is not a fit case to suspend the order of conviction imposed on the 2nd petitioner. The prayer of the 2nd petitioner for suspension of the order of conviction is therefore rejected. The suspension of sentence of accused 1 to 4 as per order dated 25.01.2023 and the conditions subject to which the sentence is suspended, will continue pending final disposal of the appeal.

Sd/-
N. NAGARESH, JUDGE

aks/30.09.2023