

**B. Subbaiah Vs. the State of Karnataka**

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**Court :** Karnataka

**Decided On :** Oct-09-1991

**Reported in :** 1992CriLJ3740; 1992(1)KarLJ419

**Judge :** B. Jagannatha Hegde and ;M. Rama Jois, JJ.

**Appeal No. :** Cr. A. No. 350/85 c/w Cr. A. 69/86 and Cr. A. 80/86

**Appellant :** B. Subbaiah

**Respondent :** The State of Karnataka

**Advocate for Def. :** Sri M.V. Devaraju and ;Sri Srinivasa Reddy, Advs.

**Advocate for Pet/Ap. :** Sri A.H. Bhagavan, ;K. Rangavajjula, ;V.N. Sathya Narayana, ;Sri Jagadeesh, ;D. Hiremath and ;Sri Vishwanath Shendge, Advs.

**Judgement :**

1. These three criminal appeals were posted for hearing before a Division Bench of this Court consisting of Chandrakantaraja Urs, J., (since retired) and one of us (Jagannatha Hegde, J.). They were divided in their opinion. In the circumstances, as provided under section 392 of the Code of Criminal Procedure ('the Code' for short) by the order of Hon'ble the Chief Justice, the appeals were posted before one of us (Rama Jois, J), for hearing. After hearing the matter, the opinion and the order was pronounced on 4-10-1991. In doing so, reference was made to para 3(ii) of the judgment to the two judgments of Calcutta High Court, namely, Nermal v.

State of West Bengal, : AIR1966 Cal194 and Jugal Kishore v. C.P. Magistrate, Calcutta, : AIR1968 Cal220 . In each of the two decisions, the third Judge who heard the criminal appeal in accordance with Section 429 of the 1898 Code, was of the view that in view of the language of that Section to the effect that the third Judge should deliver his opinion and that judgment and order shall follow such opinion, the third Judge should proceed to pass final orders. Following this ratio, opinion was furnished and an order was made following the opinion, on 4-10-1991.

2. Immediately after the pronouncement of the order of 4-10-1991, the learned counsel for the accused made an oral application under Article 134A of the Constitution of India praying for grant of certificate of fitness to appeal to the Supreme Court of India. He also made a written application praying for suspension of sentence as the accused-appellant was desirous of preferring an appeal to the Supreme Court. At this stage, in view of the submission made by Sri M. V. Devaraj, the learned Special Public Prosecutor that as according to the provisions of the Karnataka High Court Act, these appeals are required to be heard by a Division Bench the appropriate procedure to be followed, after the third Judge furnished his opinion was that the matter should be placed before the Division Bench and the Division Bench should make the order of the Court in conformity with the opinion of the third Judge. Considering that the course suggested by the Public Prosecutor was more appropriate, the matter was directed to be placed before the Division Bench. Accordingly, it has come up for passing of the order of this Court.

3. The question of law for our consideration is :

What is the appropriate procedure to be followed after the third Judge gives his opinion under section 392 of the Code

The relevant portion of Section 392 reads :

'392. Procedure where Judges of Court of appeal are equality divided : When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit,

shall deliver his opinion, and the judgment or order shall follow that opinion'.

The language of Section is in pari materia with Section 429 of the 1898 Code. It says that whenever two Judges hearing a criminal appeal are divided in their opinion, the matter should be placed before a third Judge and that he should give his opinion. Therefore, according to the Section the third Judge who hears the entire appeal, should give his opinion and that the judgment shall follow that opinion. The Section does not say that the third Judge who has given opinion should himself pass the order. All that the Section says is that the decision should follow that opinion.

4. According to Section 10 of the Karnataka High Court Act, these are matters to be heard by a Division Bench. There is no dispute on that point. From this it follows that the final operative order of these appeals should be passed by the Division Bench.

5. There are two reasons to support that view. They are :

(i) Article 134A of the Constitution provides that immediately after the pronouncement of the judgment by this Court, if the party is desirous of filing an appeal to the Supreme Court, he should make an oral application immediately after the pronouncement of the judgment. Therefore, if we follow the view expressed in the two decisions of the Calcutta High Court, it would result in this position, namely, that the third Judge who pronounces the order would be required to consider the application for grant of certificate of fitness to appeal though the matter is a Division Bench matter. Therefore, it is appropriate that the Division Bench should consider the oral application made under Article 134A of the Constitution, which can be done if only the order of the Court is made by the Division Bench.

(ii) If the accused were to make an application for suspending the sentence, it is appropriate that such a prayer had to be considered by the Division Bench and not by the third Judge alone.

6. For these reasons, we answer the question of law arising for consideration as follows :

Whenever the two Judges hearing a Criminal Appeal are divided in their opinion and the appeal is placed before a Third Judge, he should give his opinion and thereafter the matter should be posted for orders before the Division Bench which heard the matter earlier, and if the Judges who heard the matter are not available, by such Division Bench before whom the matter is directed to be placed by the order of Hon'ble the Chief Justice and that Division Bench should pass the order of the Court.

7. Accordingly, in accordance with the opinion of the third Judge, we make the following order :

I. Cr.A. No. 350/1985 :

(i) The appeal is dismissed;

(ii) Punishment of rigorous imprisonment for three years and fine of Rs. 21,92,907.52 imposed on the appellant-accused by the Special Judge is confirmed;

(iii) The bail bond of the appellant is cancelled and he shall surrender to bail to undergo the sentence imposed on him;

(iv) The household effects held as belonging to the accused shall be returned to the accused;

(v) Gold and silver articles, seized and marked as material objects, which are held to belong to the accused, shall be sold in public auction and the realisation therefrom shall be adjusted towards the amount of fine, subject to the condition that if the accused-appellant were to pay the present market value, they shall be returned to the accused and the value so paid shall be adjusted towards fine.

II. Cr.A. No. 69 of 1986 :

(i) The appeal is dismissed.

III. Cr.A. No. 80 of 1986 :

(i) The appeal is allowed;

(ii) The following items of assets of the accused shall stand confiscated to the State Government :

(a) Cash Rs. 86,341.00 (b) Fixed Deposits Rs. 1,20,008.59 (c) Bank balance in other accounts Rs. 18,077.50 (d) Cash found in Rs. 8,21,495.10 lockers (iii) All other properties standing in the name of the members of the family of the accused including Bank deposits and fixed deposits not included in the list of assets of the accused shall be returned to the persons concerned.

#### ORDER ON THE ORAL APPLICATION MADE UNDER ARTICLE 134A OF THE CONSTITUTION OF INDIA

8. Immediately after the pronouncement of the order in these appeals, in learned counsel for the appellant-accused, made an oral application under Article 134A of the Constitution of India praying for certificate of fitness to appeal to Hon'ble the Supreme Court against the judgment, under Article 134A of the Constitution of India. After considering the submissions made by the learned counsel, we are of the view that this is not a fit case for grant of certificate of fitness to appeal to the Supreme Court under Article 134A of the Constitution of India. The application is therefore rejected.

#### ORDER ON THE APPLICATION FOR STAY

9. After we made the order rejecting the oral application made under Article 134A of the Constitution praying for grant of certificate, the learned counsel for the accused-appellant pressed the application for suspending the sentence for a period of six weeks from today under section 389(3) of the Code. The relevant portion of the Section reads :

'389. Suspension of Sentence Pending the Appeal; Release of Appellant on Bail :

xxx xxx xxx (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 order 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.'

10. The learned counsel submitted that as the present case, the sentence imposed on the accused is rigorous imprisonment for a period of three years and therefore does not exceed three years, and as the accused intends to present an appeal before Hon'ble the Supreme Court, the sentence be suspended and the accused be released on bail for a period of six weeks.

11. Sri Srinivasa Reddy, the learned State Public Prosecutor, submitted that Section 389(3) of the Code is not at all attracted to this case. Elaborating his submission he stated that Section 389(3) gets attracted only where a person has got right of appeal and that if the accused has got right of appeal and the sentence imposed does not exceed three years, then, unless for recorded reasons, the Court refuses to suspend the sentence and grants bail the Court has to suspend the sentence and grant bail so as to enable the accused to present an appeal and seek appropriate orders from the appellate Court. He submitted that as the application filed by the accused under Article 134A of the Constitution of India for grant of certificate of fitness to appeal to the Supreme Court has been rejected, he has no right of appeal and therefore Section 389(3) is not attracted.

12. The learned counsel for the appellant-accused, however, submitted that the accused intends to file an application under Article 136 of the Constitution, before Hon'ble the Supreme Court and seek leave to appeal to the Supreme Court, and therefore Section 389(3) of the Code gets attracted.

13. The learned Public Prosecutor submits that Article 136 confers no right of appeal, but was only a provision to seek leave to appeal to the Supreme Court and

that if only leave is granted, the accused can prefer an appeal before Hon'ble the Supreme Court and in the absence of right of appeal, Section 389(3) is not attracted.

14. We are entirely in agreement with the submission made by the learned State Public Prosecutor that Section 389(3) applies only to a case where there is a right of appeal and that Article 136 confers no right of appeal and therefore the accused cannot invoke Section 389(3) of the Code.

15. The learned counsel for the accused-appellant, next submitted that the accused has been on bail during the pendency of the appeal for the last five years and that the accused was seriously ill and had been admitted to a nursing home and as he was desirous of preferring Special Leave Petition before Hon'ble the Supreme Court and to seek orders suspending the sentence, the sentence may be suspended and bail be granted in exercise of our inherent power under section 482 of the Code. The learned counsel for the accused-appellant also submitted that he is seeking suspension of the sentence for a period of six weeks for the reason that number of holidays are intervening.

16. The learned State Public Prosecutor submitted that when the matter regarding suspension of sentence pending filing of appeal, was covered by a special provision under section 389(3) of the Code, the power under section 482 of the Code is not available.

17. The learned counsel for the accused pleaded that as we are of the view that Section 389(3) of the Code, which requires the Court to suspend the sentence and grant bail, which in substance confers a right on the accused to get the sentence suspended and to get bail, is inapplicable, on the ground that the accused has no right of appeal, inherent power under section 482 of the Code could be invoked. The learned State Public Prosecutor does not dispute that Section 389(3) is not applicable to this case.

18. In the circumstances, having regard to the fact that the appellant-accused has throughout been on bail and he is stated to be suffering from serious ailment and has been admitted to a nursing home and he is desirous of approaching the

Supreme Court under Article 136 of the Constitution of India, we treat this application as having been made under section 482 of the Code and make the following order :-

The sentence imposed by the order of this Court is suspended for a period of six weeks from today, subject to the condition that the appellant-accused, shall execute a bond for his appearance before the trial Court/this Court, whenever he is called upon to do so, in a sum of Rs. two lakhs with two sureties for the like amount, acceptable to the trial Court.

19. Order accordingly.

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