

Dal Chand and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Jul-21-2000

Reported in : 2000CriLJ4579

Judge : G.P. Mathur and ;Bhagan Din, JJ.

Acts : [Constitution of India](#) - Article 141; Code of Criminal Procedure (CrPC) , 1974 - Sections 300, 362 and 389; Indian Penal Code (IPC) - Sections 148, 149, 302, 307 and 323; Code of Civil Procedure (CPC) - Sections 11; Code of Criminal Procedure (CrPC) - Sections 403 and 403(2)

Appeal No. : Cri. Misc. 2nd Bail Appln. No. 40179 of 1995 in Cri. Appeal No. 826 of 1995

Appellant : Dal Chand and ors.

Respondent : State of U.P.

Advocate for Def. : Ram Chandra Deepak, A.G.A.

Advocate for Pet/Ap. : S.P.S. Raghav, ;R.A. Mishra, ;Prem Prakash, ;J.S.S. Yadav, ;V.M. Zaidi, ;Ajit Chaudhary, ;A.K. Sharma and ;R.C. Upadhyay, Advs.

Judgement :

G.P. Mathur, J.

1. The question which requires consideration here is whether a second bail application at the instance of a convicted accused in a pending criminal appeal is maintainable.

2. The applicant-Dai Chand along with four other accused was convicted under Sections 148, 307 and 302 read with Section 149, I.P.C. and was sentenced to various terms of imprisonment including imprisonment for life by the judgment and order dated 27-5-1995 of VIth Addl. Sessions Judge, Bijnor in S.T. No. 228 of 1992. He preferred an appeal against his conviction and sentence and also moved an application for bail. The appeal was admitted on 31-5-1995 and the prayer for bail was ordered to be considered after receipt of record. After the trial Court record had been received, the bail application of the applicant was heard by Hon'ble G. Malaviya, J. who rejected the same by the order dated 31-7-1995. The applicant, then moved a second application for bail which came up for hearing before Hon'ble G. Malaviya, J. on 8-9-1995 who was of the opinion that in an appeal against conviction no new facts can emerge after rejection of the first bail application and hearing of second bail application would amount to disturbing the finality attached to the order passed while rejecting the first bail application. He, therefore! referred the question whether after having come to a conclusion that there was no ground for granting bail to a convicted accused, can the Court examine the record again and arrive at a different conclusion that the accused be released on bail. That is how the matter has been placed before us for answering the reference.

3. The power to grant bail in an appeal by an appellate Court has been conferred by Section 389, Cr.P.C. and it provides that 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 under confinement, that he be released on bail. Section 389, Cr.P.C. does not put an embargo on the power of the appellate Court to grant bail to a convicted person if his application for bail has been rejected at an earlier stage. It may be examined whether there is any statutory provision which creates a bar in the hearing of a second bail application. Generally a Court or Tribunal is not entitled to reopen or review its decision finally disposing of a case except for the

limited purpose of correcting a clerical or arithmetical error unless such a power is specifically conferred by statute. In *Drew v. Willis* 1891 (1) QB 450 Lord Esher, M.R. pointed out that

no Court (and I would add no authority) has...a power of setting aside an order which has been properly made, unless it is given by statute.

In *Hession v. Jones*, 1914 (2) KB 421, it was held that the Court under the statute has no power to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it. It is settled law that a case is not open to appeal unless the statute gives such a right and the power to review must also be given by the Statute. Even a quasi-judicial order once passed and having become final cannot be reviewed by the authority passing that order unless power of review has been specifically conferred (See *Patel Narshi Thakershi v. Pradyamunsinghji* AIR 1970 SC 1273; *D.N. Roy v. State of Bihar* AIR 1971 SC 1045 and *State of Bihar v. J. N. Roy Biswas* AIR 1975 SC 2277). However, this principle applies to such judgment and order by which a case is finally disposed of.

4. The Code of Criminal Procedure contains some provisions which create a bar against rehearing the matter. Section 362, Cr.P.C. lays down that save as otherwise provided by the Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. The bar created here is against altering or reviewing a Judgment or final order disposing of a case. An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties. There can be no dispute that the order passed on a bail application is an interlocutory order and cannot be said to be 'judgment or final order disposing of a case.' Therefore, Section 362, Cr.P.C. can have no application to rejection of a bail application. Section 300, Cr.P.C. lays down that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not liable to be tried again for the same offence. This provision creates a bar against a second

trial of a person who has once been tried by a Court of competent Jurisdiction for an offence and has either been convicted or acquitted for such an offence Section 300, Cr.P.C. will also not apply to a bail application as a decision on the said application neither convicts nor acquits the accused. There is no other provision in the Code which may create a bar against maintainability of second bail application and consequently the statutory provision of the Code of Criminal Procedure do not at all create a bar in entertaining a second bail application at the instance of a convicted accused in an appeal.

5. The learned single Judge while making the reference has observed that 'it is no longer in dispute that plea of constructive res judicata are applicable to the criminal proceedings also' and on its basis was of the opinion that the second bail application is barred. Res judicata has been defined in Section 11 of the Code of Civil Procedure it lays down that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The provision of res judicata as defined in Section 11 of Code of Civil Procedure can have no application in a criminal trial or appeal. However, that does not mean that the findings recorded in an earlier trial for criminal offence are not sacrosanct or that they can be reopened. The rule which is applicable to a criminal trial is a rule of 'issue estoppel' as contained in Section 300, Cr.P.C. (old Section 403). This rule was explained by a Constitution Bench in *Manipur Administration v. Thokchom Bira Singh* AIR 1965 SC 87, in following words :

The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2). The rule is not

the same as the plea of double jeopardy or autrefois acquit. The rule does not introduce any variation in the Code of Criminal Procedure either in investigation, enquiry or trial. It also does not prevent the trial of any offence as does autrefois acquit but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a Court of competent jurisdiction. The rule thus relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial.

6. The same principle was reiterated in *State of A.P. v. Kokkiligada* AIR 1970 SC 771 : 1970 Cri LJ 759 and *Lalta v. State of U.P.* AIR 1970 SC 1381 : 1970 Cri LJ 1270. The principle of 'issue estoppel' does not prevent the trial of any offence but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial before a Court of competent jurisdiction. The principle of 'issue estoppel' can have no application to a hearing of a second bail application as no finding of fact touching any of the issues involved in the appeal is recorded while hearing first bail application nor in the second bail application any evidence is sought to be adduced to disturb any such finding. Therefore, there is no such principle of criminal jurisprudence which may create a bar against the maintainability of a second bail application.

7. An identical question was considered in *Babu Singh v. State of U.P.* 1978 (1) SCC 579 : AIR 1978 SC 527. Here the accused were acquitted by the learned Sessions Judge for the charge of murder and the appeal against the acquittal preferred by the State was allowed and the accused were convicted. They preferred an appeal before the Supreme Court and also moved an application for bail which was rejected. Thereafter they filed a second application for bail. The Court observed as follows in para 2 of the reports (at page 528 of AIR) :

Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning, we must mention that, at an earlier stage, their application for bail was rejected by this Court on September 7,

1977. But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.

In view of above authoritative pronouncement by the Apex Court, which is binding under Article 141 of the Constitution, it cannot be held that second application for bail by way of interlocutory relief is not maintainable in law. In the same judgment, the Supreme Court also emphasised the factors which have to be kept in mind while granting bail to an accused and the relevant part of para 13 of the reports is being reproduced below:

Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible into the case. As Erie, J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged.

However, we must make it clear that a second bail application would be maintainable only on some substantial ground where some point which has a strong bearing on the fate of the appeal and which may have the effect of reversing the order of conviction of the accused is made out. Apart from the ground on the merits of the case, a second application for bail would also be

maintainable on the ground of unusual long delay in hearing of the appeal as in the event the appeal is not heard within a reasonable time and the convicted accused undergoes a major part of the sentence imposed upon him, the purpose of filing of the appeal itself may be frustrated. The Apex Court considered the question of grant of second bail application on the ground of delay in *Kashmira Singh v. State of Punjab* AIR 1977 SC 2147 : 1977 Cri LJ 1746. In this case, the accused was tried for an offence of murder but he was convicted only under Section 323, I.P.C. by the trial Court. The appeal against acquittal preferred by the State was allowed by the High Court and he was convicted under Section 302, I.P.C. and was sentenced to imprisonment for life. Thereafter he filed an appeal in the Supreme Court where special leave was granted to him on 28-2-1974 but his prayer for bail was refused. After more than three years he filed a second bail application which was allowed on 2-9-1977 on the ground that as the Court was not in a position to hear the appeal within a reasonable period of time, it would be appropriate to release the applicant on bail in a case where special leave had been granted to the accused. Though the case is distinguishable on facts as the accused had been acquitted for the offence under Section 302, I.P.C. by the trial Court but had been convicted by the High Court in an appeal against acquittal, nevertheless the principle for entertaining the second bail application on the ground of delay in hearing the appeal would be applicable here. A strong humanitarian ground which may not necessarily pertain to the accused himself but may pertain to someone very close to him may also, in certain circumstances, be a ground to entertain a second bail application. These are some of the grounds on which second bail application may be entertained. It is not only very difficult but hazardous to lay down the criteria on which a second application for bail may be maintainable as it will depend upon peculiar facts and circumstances of each case.

8. Our answer to the question referred by the learned single Judge is that a second application for bail at the instance of a convicted accused is maintainable in a criminal appeal.