

Santosh Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Oct-14-1999

Reported in : 2000CriLJ1835; 2000(2)MPHT241

Judge : D.M. Dharmadhikari, ;Dipak Misra and ;S.K. Kulshrestha, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 389, 437 and 439;
Indian Penal Code (IPC) - Sections 302

Appeal No. : Criminal Appeal No. 1560/96

Appellant : Santosh

Respondent : State of M.P.

Advocate for Def. : Dilip Naik, Addl. Adv. General

Advocate for Pet/Ap. : Rajendra Singh and ;R.K. Shukla, Advs.

Judgement :

ORDER

S.K. Kulshrestha, J.

1. 'Whether the second or successive bail applications in a pending appeal or bail application under Section 389 or 437/439, Criminal Procedure Code, should be considered by the Bench which has considered the first bail application unless the

Court which decided the first application is not available for a sufficient duration, such as when the Court is in vacation' is the question referred for our answer by a Division Bench of this Court in the context of an earlier decision of a Division Bench at Indore Seat in *Gopal v. State of M.P.*, 1999 (2) Vidhi Bhasvar 22 viewed as conflicting with the ratio of a Full Bench decision of this Court in *Narayan Prasad v. State of Madhya Pradesh*, 1993 MPLJ 1 and the decision of the Supreme Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan*, AIR 1987 SC 1613.

2. The appellant had filed the present appeal against the Judgment dated 20-8-1996 of the Learned First Additional Sessions Judge, Hoshangabad, in Sessions Trial No. 102/95, by which he has been convicted of an offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life. Along with the appeal, an application I.A. No. 6659/ 96 for suspension of sentence and grant of bail during the pendency of the appeal was also filed, which was rejected by order dated 9-1-1997 by the Division Bench of N.P. Singh and V.K. Agarwal, JJ. with liberty to the appellant to renew the prayer for bail after two years if the case was not disposed of in the meanwhile. Accordingly, another application I.A. No. 424/99 was submitted under Section 389 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') for suspension of sentence and grant of bail, which was placed before another Division Bench in view of the Judgment in *Gopal v. State of M.P* (supra). The Division Bench noticed that the usual practice of the Court was to post such applications before the Bench which earlier dismissed the application for grant of bail and in the light of the decision of the Supreme Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* (supra) and of a Full Bench of this Court in *Narayan Prasad v. State of Madhya Pradesh* (supra), the said question has now been referred to this Full Bench.

3. The posting of the subsequent bail applications before the same Bench which had earlier rejected an application, was never considered to be an imperative of law, but this requirement was recognized in view of the long standing convention and judicial discipline. It was observed in *Shahzad Hasan Khan's* case that the convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle as it prevents

abuse of process of Court and obviates possibility of an impression that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not. It was further observed that if successive bail applications on the same subject are permitted to be disposed of by different Judges, there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the Court and the confidence of the other side being put in issue and, therefore, judicial discipline required that such matters were placed before the same Judge, if he was available, for orders. Again, in a case where an accused had been enlarged on bail for a period of two months after his applications had earlier been rejected by another Bench, it was observed in *State of Maharashtra v. Buddhikola Subha Rao*, AIR 1989 SC 2292 that in such cases it was necessary to act with restraint and circumspection so that the process of the Court was not abused by a litigant and an impression was not created that a litigant has either successfully avoided one Judge or selected another to secure an order which he had not been able to obtain. It was emphasized that in such a situation, the proper course was to direct that the matter be placed before the same Judge who had disposed of the earlier application. The observations contained in Paragraph 7 of the report read as extracted below :--

'7. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course, we think, is to direct that the matter be placed before the same learned judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of Court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a Court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In this view that we take we are fortified by the observations of this Court in Paragraph 5 of the judgment in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan*, (1987) 2 SCC 684 = AIR 1987 SC

4. Yet in another case where bail granted by a Bench was cancelled by another Bench, it was observed by the Supreme Court in *Vikramjit Singh v. State of M.P.*, AIR 1992 SC 474 that such a practice was not consistent with the judicial discipline which must be maintained by Courts, otherwise a party aggrieved by an order passed by one Bench of the High Court would be tempted to attempt to get the matter re-opened before another Bench and there would not be any end to such attempts.

5. A Division Bench of this Court had an occasion to deal with the question whether in view of dictum of the Apex Court in *Shahzad Hasan Khan's* case, a subsequent application for bail was required to be placed before the same judge before whom an earlier application for bail of the same applicant was dismissed as not pressed, so long as he was available, in *Munna Singh v. State of M.P.*, 1989 MPLJ 414. It was observed that even if the earlier bail application had been dismissed as withdrawn or not pressed, a subsequent bail application of the same applicant should be placed for hearing before the same judge who had rejected the earlier bail application, so long as he was available. It is, therefore, clear that insofar as bail applications under Section 439 of the Code are concerned, the series of decisions referred to above leaves no manner of doubt that any subsequent application for bail under that provision is required to be placed before the same Bench/Judge, which/who had rejected the earlier application of the applicant, if available. However, the learned judges constituting the Division Bench in *Gopal v. State of M.P.* (supra) have observed that there was a basic distinction between a bail application under Section 439, Criminal Procedure Code and the application for suspension of sentence under Section 389 in coming to the conclusion that the applications under Section 389, Criminal Procedure Code are liable to be posted before the Bench handling the Roster and not before the Bench which rejected the earlier application. The Division Bench has observed that the observations of the Supreme Court in *Shahzad Hasan Khan's* case and of the Full Bench in *Narayan Prasad v. State of Madhya Pradesh* (supra), were required to be read in their particular context and did not lay down any abstract rule that all subsequent bail applications had to be listed before the same Judge/ Bench and,

therefore, did not recognize the said decisions as precedent laying down that all subsequent bail applications were to be posted before the same Bench which handled the first application. It was observed that the applications under Sections 389 and 439 of the Code fall under different chapters and while the order passed in an application under Section 389 of the Code is an interim order which suspends the sentence of a convict pending adjudication of his appeal, an order in bail application in exercise of jurisdiction under Section 439, Criminal Procedure Code is a final order which ends the custody of an accused person finally. In this view of the matter, their Lordships observed that one cannot be equated with the other and since an application for suspension of sentence is a class by itself, maintainable only in a pending appeal and forming its integral part, it has to swim or sink with the appeal and would receive consideration wherever the appeal does. It was observed that the application cannot be detached or disintegrated from the appeal to be posted before the same Bench/Judge who had dealt with like application earlier and such a course would lead to anomalous situation where appeal would be handled by one Bench and the application for suspension of sentence by the other.

6. In view of the observations made by the Division Bench in *Gopal v. State of M.P.* (supra), the question that falls for determination is whether the principle inhibiting exercise of power by a Bench different from the Bench which had earlier rejected bail application, is also applicable in matters relating to subsequent or successive applications under Section 389, Criminal Procedure Code. While it is true that in both cases, the result is that a person is enlarged on bail, but we find it difficult to appreciate how such enlargement in the case of a convict is temporary and in the case of an under trial accused, it is permanent. In both cases, bail is granted for a limited purpose; the purpose being to secure the presence of the accused in a pending trial so that he undergoes the sentence, if convicted, while in the case of convict to secure his presence to serve out his sentence, if the same is maintained in appeal. The bail is merely a respite in the sense that the person, be he an under-trial accused or a convict, is restored his liberty with the fetters of the conditions attached, for securing his presence. In both cases, the person admitted to bail has to observe the conditions on which he is released from confinement. It is, therefore, difficult to hold that the bail granted by the High Court to an under-

trial accused is a final order which ends the custody of an accused finally. As observed by a Full Bench of the Kerala High Court in *Uthaman v. State of Kerala*, 1983 Cr.L.J. 74, the presumption of existence of reasonable grounds of the accused being guilty of an offence would not arise by reason of a conviction in a motion for bail pending disposal of appeal. It is also difficult to conceive any anomalous situation merely because the bail application has been considered by a Bench different from the Bench handling the appeal Roster as the grant or refusal of bail has no bearing on the decision in the appeal. The applications for suspension of sentence and grant of bail are taken up for consideration at a stage anterior to the hearing of the appeal and in view of the changing Roster, it is not necessary that the appeal would come up before the same Bench which had dealt with application for suspension of sentence and grant of bail. The anomaly referred to by the Division Bench, if conversely applied, be a tantamount to holding that if the application for suspension of sentence has been decided by a Bench, the Appeal whenever ripe for hearing, must be listed before it only, to ensure that the same Bench hears the appeal.

7. We have now to see whether the matter of placing the subsequent application for suspension of sentence and grant of bail before the same Bench which had rejected the earlier application, is the ratio of the Full Bench decision in *Narayan Prasad v. State of Madhya Pradesh* (supra) or is just an observation required to be read in the context of the facts of the said case.

8. It is true that a decision ordinarily is a decision on the case before the Court while the principle underlying the decision would be binding as a precedent in case which comes up for decision subsequently. It is, therefore, necessary to elicit as to what was the question involved in the case before the Full Bench in *Narayan Prasad v. State of Madhya Pradesh* (supra). A reference to Paragraph 7 of the report clearly shows that the question had arisen in a pending appeal with regard to an application for suspension of sentence and after considering the decision of the Supreme Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* (supra), it was observed :

'From the Supreme Court case (supra), it is distinctly clear that though the criminal appeal may have been placed before any Bench for hearing but the subsequent bail applications of the appellant have to be necessarily placed before the same Bench or learned Judge for disposal, if he is available, who had passed the earlier orders. Similar view has been expressed by a Division Bench of this Court in the case of Munna Singh (supra). But the decision in the case of Chandrahas (supra) deals with different facts and with quite a different aspect of the matter which has not been touched in any of the two decisions namely, Shahzad Hasan Khan and Chandrahas (supra).'

9. From the above, it is clear that the Full Bench had clearly dealt with the case of listing of the subsequent application for suspension of sentence and grant of bail in an appeal pending before the High Court and recorded its conclusions in Paragraph 10, as extracted below :

'But in the present case on such situation exists as it existed in the case of Chandrahas. It is simple case where the earlier orders on the bail applications were passed by the Division Bench consisting of Dr. T.N. Singh and S.K. Dubey, JJ. and, therefore, in our opinion, the subsequent bail application should be heard and decided by that Bench alone, the same being available also. The question whether it is a Special Bench or a Regular Bench is irrelevant. We answer the reference accordingly. The matter be placed now before the referring Division Bench for consideration and disposal of LA. No. IV according to law.'

10. The decision of the Full Bench, therefore, decided the principle with regard to the necessity of listing the subsequent application for suspension of sentence before the same Bench which had rejected the application made in this behalf earlier. The underlying principle enunciated is, therefore, a binding precedent. The Division Bench decision in Gopal v. State of M.P. being, thus, in apparent conflict, must yield to the decision of the Full Bench in Narayan Prasad v. State of M.P. and is, accordingly, overruled.

11. Accordingly, this reference is answered in affirmative and we hold that the second or successive bail applications in a pending appeal or bail application under Section 439 of the Code should be considered by the Bench which has

considered the first bail application unless the Bench which decided the earlier application, is not available for a sufficient duration. The matter may now be placed before the appropriate Bench in accordance with the above observations.

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