

## **Hemu Pant @ Hemu Kalu & Another vs State Of Uttarakhand on 23 June, 2015**

**Equivalent citations: AIR 2015 UTTARAKHAND 170, (2016) 1 RECCRIR 437, (2016) 1 ALLCRILR 195, 2016 (1) KLT SN 57 (UTR)**

**Author: Alok Singh**

**Bench: Alok Singh, Servesh Kumar Gupta, U.C. Dhyani**

IN THE HIGH COURT OF UTTARAKHAND  
AT NAINITAL

Criminal Appeal No. 336 of 2013

Hemu Pant @ Hemu Kalu and another.

.....Appellants.

Versus

State of Uttarakhand.

. . . . .Respondent.

Present:

Ms. Pushpa Joshi, Sr. Advocate assisted by Mr. Amit Kapri, Advocate for appellants.

Mr. D.K. Sharma, Addl. Advocate General with Mr. V.S. Rathor, AGA for State of Uttarakha

Mr. S.P.S. Panwar and Mr. Arvind Vashisht, Sr. Advocates with Mr. Ramji Srivastava and M  
Bhatia, Advocates for the interveners.

Coram:

Hon'ble Alok Singh, J.

Hon'ble Servesh Kumar Gupta, J.

Hon'ble U.C. Dhyani, J.

Per: Hon'ble Alok Singh, J (Oral) The Division Bench of this Court vide order dated 12.1.2015 passed in Criminal Appeal No. 336 of 2013, Hemu Pant @ Hemu Kalu & another vs. State of Uttarakhand, was pleased to formulate and refer the question of law to the Full Bench of this Court, which reads as under: -

"Whether, the second/subsequent bail application, which is filed subsequently in pending criminal appeal, should be considered by the same Bench, which has rejected the earlier bail application(s) or by regular Bench?"

This is how this matter is placed before us for consideration. Before entering into the controversy, we would like to narrate few facts to understand the controversy. Vide judgment and order dated 19.08.2013 passed by learned Sessions Judge, Nainital in S.T. Nos. 30/2007, 31/2007 and 32/2007,

both the accused namely Hemu Pant @ Hemu Kalu and Manish @ Kanchu Matiyani were convicted and sentenced for the offences punishable under Sections 302, 364 and 201 IPC and one punishable u/s 4/25 of the Arms Act. Feeling aggrieved, both the accused preferred the criminal appeal no. 336 of 2013 before this Court.

An application being Bail Application No.1364 of 2013 seeking regular bail during pendency of appeal was moved by both the appellants, however, the same was permitted to be withdrawn with liberty to file fresh vide order dated 18.10.2013 passed by the Division Bench (consisting of Barin Ghosh, C.J. and Servesh Kumar Gupta, J).

Thereafter, second bail application was moved by both the appellants being CRMA No. 1658/2013, however, the same was dismissed on merit on 26.11.2013 by the Bench (consisting of Barin Ghosh, C.J. and Servesh Kumar Gupta, J.).

Thereafter, third bail application was moved by one of the appellants viz. Manish @ Kanchu Matiyani, being CRMA 1009 of 2014, which was taken up for hearing by another Bench, as per Roster (consisting of V.K. Bist, ACJ and U.C. Dhyani, J). Vide order dated 17.07.2014, the said Bench was pleased to enlarge the appellant Manish @ Kanchu Matiyani on bail during pendency of appeal, on his executing a personal bond and furnishing two sureties, each in the like amount, to the satisfaction of C.J.M. concerned.

Appellant Hemu Pant @ Hemu Kalu, thereafter, moved third bail application, being CRMA 1089 of 2014, seeking regular bail claiming parity with another co-accused namely Manish @ Kanchu Matiyani. The third bail application moved by Hemu Pant @ Hemu Kalu was listed as per Roster before third Bench (consisting of Alok Singh, J and Servesh Kumar Gupta, J). The third bail application was taken up for hearing on 27.08.2014 and one of us (Alok Singh, J) opined that Hemu Pant @ Hemu Kalu is also entitled to be enlarged on bail on the principle of parity. However, one of us (Servesh Kumar Gupta, J.) was of the view that since the first and second bail applications were rejected by the First Bench (consisting of the then Barin Ghosh, CJ and Servesh Kumar Gupta, J), thus, the third bail application moved by co-accused Manish @ Kanchu Matiyani ought not to have been entertained by another Bench (consisting of V.K. Bist, J and U.C. Dhyani, J), and thus, declined to enlarge the accused Hemu Pant @ Hemu Kalu on bail on the principle of parity.

Since, there were conflicting views between us i.e. (Alok Singh and Servesh Kumar Gupta, JJ), therefore, the matter was placed before the third Judge i.e. Sudhanshu Dhulia, J. Learned Third Judge (Sudhanshu Dhulia, J) vide order dated 25.09.2014 was pleased to reject the third bail application moved by Hemu Pant @ Hemu Kalu, saying that he is not entitled for the parity with another co-accused Manish @ Kanchu Matiyani.

Thereafter, appellant Hemu Pant @ Hemu Kalu moved fourth bail application, being CRMA No. 1663/2014, which was placed for hearing before the Division Bench, as per roster (consisting of V.K. Bist and U.C. Dhyani, JJ). Vide order dated 12.01.2015, question of law, as reproduced hereinbefore was formulated and was referred to the larger Bench.

Identical issue was referred to the Full Bench of Madhya Pradesh High Court in the case of Santosh Vs. State of M.P. reported in 2000 Criminal Law Journal 1834. The full Bench of Madhya Pradesh High Court, while referring to several pronouncements of Hon'ble Apex Court and Madhya Pradesh High Court, was pleased to hold that subsequent bail application or application for suspension of sentence should be heard and decided by the Bench, which has earlier rejected the previous application moved by the accused appellant.

Again identical issue was referred to another Full Bench of Madhya Pradesh High Court in the case of Gopal Vs. State of M.P. reported in 2005 (1) RCR (Criminal) 126. The second Full Bench of Madhya Pradesh High Court while placing reliance on the Hon'ble Apex Court's judgments in the case of Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan reported in AIR 1987 SC 1613; State of Maharastra Vs. Buddhikota Subha Rao reported in AIR 1989 SC 2292; Harjeet Singh Vs. State of Punjab reported in AIR 2002 SC 281; Kalyan Chandra Sarkar Vs. Rajesh Ranjan reported in 2004 AIR SCW 1581, has held as under:

"Recently in Kalyan Chandra Sarkar v. Rajesh Ranjan AIR 2004 SCW 1581, the Supreme Court has held that though an accused has a right to make successive applications for grant of bail the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the Court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. In view of this dictum of the Supreme Court it is all the more necessary that the subsequent bail application should be listed before the Judge or the Judges who rejected the earlier application. If a Judge who has been a member of the Division Bench which rejected the earlier bail application is also a member of the subsequent Division Bench then the latter Bench would be in a better position to consider the reasons and grounds on which the earlier bail applications were rejected and also to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. We accordingly answer to the questions referred to us as under:-

(a) When a first application for bail preferred in a pending appeal under Section 389(1) of the Code has been considered by a Division Bench and faced rejection and thereafter the second bail application is filed and due to the non-availability of earlier Division Bench, a second Division Bench deals with the matter and rejects the application, the other successive and subsequent bail applications should go before the said Bench and not before the Bench that has been given the roster to deal with such matter.

(b) If the first application for bail has been preferred under Section 389 of the Code and has been rejected by a Bench and if one of the members of the Bench is available, the subsequent bail applications should be listed before a Bench of which he is a member and it should not go before the regular Bench as per roster."

Recently, identical question was referred to the Full Bench of Jharkhand High Court in the case of Lurdhu Marandi Vs. State of Jharkhand reported in 2015 CRLJ 1541. The Full Bench of Jharkhand High Court while referring to the several judgments of Hon'ble Apex Court in the case of Shahzad Hasan (supra), Captain Buddhikota Subha Rao (supra), Harjeet Singh (supra), M. Jagan Mohan Rao Vs. P.V. Mohan Rao reported in 2010 (15) SCC 491, Chetak Construction Ltd. Vs. Om Prakash reported in 1998 (4) SCC 577 and Jagmohan Bahl Vs. State (NCT of Delhi) reported in 2015 (1) RCR (Criminal) 291 has held as under:

"In our considered view, the principle applicable in matters relating to subsequent or successive application under Section 439 of the Code would be applicable to the subsequent or successive bail application under Section 389 of the Code also, as in both the cases the result is that a person, may be an under trial prisoner or convict, is enlarged on bail. If the convict is released on bail by suspending his sentence under Section 389(1) of the Code, it is a temporary relief to him and in the event of his appeal being dismissed, he will be taken into custody. Similarly, in a case of under trial prisoner, the bail granted to him under Section 439 of the Code is also temporary in nature and on his conviction, the said bail would stand cancelled. Therefore, in both the eventualities, it is a respite to the under trial accused or a convict for the time being. So, basically the situation in an application filed under Section 439 of the Code or under Section 389 of the Code does not materially change so far as its' effect is concerned, but for the fact that one situation deals with grant of bail during the trial and the other situation deals with suspension of sentence and then bail during the pendency of the appeal.

21. We appreciate this aspect, yet from another angle. While moving second bail application or successive bail application(s) under Section 439 of the Code, the plea of changed circumstance cannot be applicable to an under trial with the progress of trial depending upon the quality of the prosecution evidence adduced at different stages, yet the second bail application or the successive bail application(s) for the same purpose has to be heard by the same Bench, if available, as per the series of decisions of Hon'ble Supreme Court, whereas while dealing with an application under Section 389(1) of the Code, the facts of the prosecution case in which once the conviction is proved, would never change and he can develop his case only once for the purposes of suspension of sentence on merits of the appeal atleast and the said prayer, if declined on merits of the case, cannot be reagitated except in exceptional circumstances, which would be very few. Therefore, the second bail application or the successive bail application(s) should be heard by the same Bench, who has earlier rejected bail application of the convict.

22. We appreciate this situation, still from another angle. In case second or successive bail application is heard by a coordinate Bench, after having been rejected on merits by another Bench and incidentally in the wisdom of that very Bench, the second bail application is allowed, it would amount to disturbing the earlier order passed by the coordinate Bench and this exercise can be done only by a Court of

Appeal and not otherwise. It, in turn, would disturb the judicial system and credibility of the Court, and this cannot be permitted.

23. As a sequel to the aforesaid discussion, two situations arise; one "judicial necessity" and the other "judicial compulsion". Judicial necessity requires that once the earlier bail application has been rejected by a particular Bench, the second bail application or successive bail application(s) for the same relief should be placed before the same Bench or before a Bench of which one of the members, who is available on account of transfer/retirement of the other member. This is in order to maintain the judicial discipline and credibility of the Court, may be at the cost of convenience of the Bench/Judge and it can also in some manner cause delay in considering other matters on the Board, but, these factors, in our considered view, take the back seat as judicial discipline or credibility of the Court is the paramount consideration. The second situation is when a particular Bench or none of its Members is available, as judicial compulsion, the second bail application or for that matter successive bail application has to be put up before the Bench as per the regular roster, as it cannot go unattended. These are exceptional circumstances.

26. We, accordingly, answer to the aforesaid two questions formulated by us in paragraph 3 as under:-

(a) When a first application is preferred under Section 389(1) of the Code for suspension of substantive sentence by the accused/convict and considered by a Division Bench and faced rejection, the second application or for that matter successive application(s) for the same relief shall be heard by the same Division Bench, who has rejected the earlier bail application and not before the Bench which has been given the roster to deal with such matters.

(b) After the first application for suspension of sentence preferred under Section 389(1) of the Code has been rejected by a Bench and if one of the Members of the Bench is available, the subsequent bail application shall be listed before a Bench of which he is a Member and it should not go before the regular Bench as per the roster.

It is only in exceptional circumstances, such bail application(s) shall go before the regular Bench as per roster.

However, the situation would be different in cases of applications under Section 389(1) of the Code to be dealt by Single Bench after once being rejected. If the same Bench is available, undoubtedly, it shall be heard by the same Bench and in the event of the Bench being not available on account of transfer, retirement, etc. or for any other exceptional circumstance, the said application shall be put up before the regular Single Bench, as per roster."

The Full Bench of Allahabad High Court in the case of Maya Dixit Vs. State of U.P. reported in 2010 (4) ESC 2933 has held as under:

"Thus, the following principles emerge from the foregoing discussions:

(1) The administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative.

(2) The Chief Justice alone has the right and power to decide how the Benches of the High Court are to be constituted : which Judge is to sit alone and which cases he can and is required to hear as also which Judges shall constitute a Division Bench and what work those Benches shall do.

(3) The puisne Judges can only do that work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice.

(4) Any order which a Bench or a single Judge may choose to make a case that is not placed before them or him by the Chief Justice or in accordance with his direction is an order without jurisdiction and void.

(5) Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India.

(6) For exercising the jurisdiction under Article 215 of the Constitution of India, the procedure prescribed by law has to be followed.

17. From the law as earlier quoted, it would be clear that the Division Bench assigned with a particular work can only do the work assigned and cannot do the work assigned to another Division Bench even in respect of earlier matter which it was hearing when the Chief Justice had assigned work to that Bench to take up the matter. After the assignment has changed, unless specifically ordered the previous Bench cannot hear the matter. Even in respect of tied up matters, in terms of the rule quoted above, the matter may ordinarily be laid before the same Bench for disposal. The expression "ordinarily" would mean that the authority empowered to assigning matters must exercise that power to place the matter before the Bench, which earlier had heard the matter. This can be done in individual cases or by a general order. This rule is based on the principle that a Bench having substantially heard the matter and spent valuable judicial time, must be allowed to ordinarily hear and dispose of the matter. This power, therefore, could only be exercised by the Chief Justice who constitutes the Benches and not by the Registry of the Court, nor can a Bench hold that it can proceed with the matter as a part heard matter."

Mr. S.P.S. Panwar and Mr. Arvind Vashisht, Sr. Advocates with Mr. Ramji Srivastava and Mr. H.M. Bhatia, Advocates and Mr. D.K. Sharma, Addl. Advocate General assisted by Mr. V.S. Rathor, AGA appearing for the State, have vehemently submitted that in view of pronouncements of Full Benches

of Madhya Pradesh High Court, Jharkhand High Court and Allahabad High Court and several pronouncements of Hon'ble Apex Court referred therein, there is no need to take contrary view.

Having perused all the pronouncements referred hereinbefore, we find ourselves in the full agreement with the view expressed by the Full Bench of Madhya Pradesh High Court, Jharkhand High Court and Allahabad High Court.

Ms. Pushpa Joshi, Sr. Advocate, appearing for the appellant, however, submits that since Uttarakhand High Court is a small High Court, therefore, subsequent bail application should be heard by the Bench hearing the criminal appeals, as per Roster.

We have given our anxious consideration to the submission made by Ms. Pushpa Joshi, Sr. Advocate, appearing for the appellant.

In our considered opinion, number of Judges and Benches will not make any difference, so far as the settled principle of law is concerned, therefore, we are really unable to accept the view of Ms. Pushpa Joshi, Sr. Advocate, therefore, our answer to the question referred to us is as under:

"That subsequent bail application or application seeking suspension of sentence shall be placed and heard by the Bench, which has earlier rejected the previous bail application or application seeking suspension of sentence. However, if Roster is changed and subsequent bail application is moved, Registry shall list the subsequent application before the same Bench, which has rejected the previous application after obtaining appropriate general or express orders of the Hon'ble the Chief Justice to constitute previous Bench. However, if subsequent bail / suspension of sentence application is placed before the another Bench, as per Roster, such Bench shall direct the Registry to obtain the orders of Hon'ble the Chief Justice to place the subsequent bail application or application for suspension of sentence before the same Bench, which has earlier rejected the bail application whereupon Hon'ble the Chief Justice, the master of Roster, ordinarily, shall issue the direction to place the subsequent application before the Bench, which has earlier rejected the previous bail / suspension of sentence application. If one of the Members of the previous Bench, which has rejected earlier bail application / suspension of sentence, is not available due to retirement or transfer, then subsequent bail application or application for suspension of sentence, shall be placed before the Bench of which one of the Member shall be the Member of the previous Bench, which has rejected the earlier bail application or application for suspension of sentence. However, Hon'ble the Chief Justice may assign the subsequent bail / suspension of sentence application to another Bench, as he deems fit, by specific order. Reasons assigning the subsequent bail / suspension of sentence application to another Bench need not to be disclosed by Hon'ble the Chief Justice."

Let record be placed before the Division Bench, which has referred the matter before this larger Bench.

(U.C. Dhyani, J.) (Servesch Kumar Gupta, J.) (Alok Singh, J.) 23.06.2015 SKS