STATE OF MAHARASHTRA

v.

CAPTAIN BUDDHIKOTA SUBHA RAO

SEPTEMBER 29, 1989

[A.M. AHMADI AND K.N. SAIKIA, JJ.]

Constitution of India, 1950: Article 136—Court does not interfere with order granting bail—Court will interfere when judicial discipline is sacrified at the alter of judicial discretion.

The respondent, a retired Naval Officer, was apprehended at the Bombay International Airport when he was about to take a flight to New York. On search of his luggage certain highly sensitive documents were found, and he was arrested for breach of the provisions of the Official Secrets Act, 1923 and the Atomic Energy Act, 1962.

The respondent filed a number of applications for being released on bail *inter alia* on medical grounds. This batch of applications were rejected by Puranik, J. The attention of Puranik, J. was, however, not drawn to the pendency of one more such application, in which the respondent had prayed for grant of bail to facilitate yogic exercises under expert guidance at his residence. The respondent had sought precisely the same relief in an earlier application which had been rejected by Puranik, J. Two days after the rejection of the group of bail applications by Puranik, J., the pending application was disposed of by Suresh J., who directed that the respondent be enlarged on bail, on certain conditions which amounted to virtual house arrest.

Before this Court the appellant-State has assailed the propriety of the order granting bail passed by Suresh, J. just two days after Puranik, J. had rejected the batch of bail applications. On the other hand, it was contended on behalf of the respodent that this Court should refrain from exercising jurisdiction under Article 136 to cancel bail granted by the High Court.

Allowing the appeal, this Court,

HELD: (1) It is true that ordinarily this Court does not interfere with an order granting bail, but in the facts of this case the Court feels that judicial discipline will be sacrificed at the alter of judicial discretion if the Court refused to exercise its jurisdiction under Article 136 of the Constitution. [322C]

A **(2) When the batch of bail applications were put up before Puranik, J., his attention was not drawn to the pendency of one more such application. Even if the said application was filed after the hearing started before Puranik, J., the learned Judge could have been told about its pendency before he rendered his decision. This conduct of the respondent has given rise to the argument that the respondent desired**
B **to keep the question regarding his enlargement on bail alive. [320B-C]**

(3) What is important to realise is that in the bail application before Suresh, J. the respondent made an identical request made earlier in an application placed before Puranik, J. Once that application was rejected there was no question of granting a similar prayer. That is virtually overuling the earlier decision without there being a
C **change in the fact-situation, which would mean a substantial change having a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. [321D-E]**

(4) Judicial discipline, propriety and comity demanded that the
D **impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J., only a couple of days before, in the absence of any substantial change in the fact-situation. [321F]**

(5) In such a situation the proper course is to direct that the
E **matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent an impression being created that a litigant is avoiding or selecting a court to secure an order of his liking.**

Shahzad Hasan Khan **v.***Ishtiaq Hasan Khan,* **[1987] 2 SCC 684,**
F **referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 603 of 1989.

From the Judgment and Order dated 8.6.1989 of the Bombay High
G Court in Crl. Application No. 995 of 1989.

B.R. Handa and A.M. Khanwilkar for the Appellant.

Ram Jethmalani, P.K. Dey, Ms. Rani Jethmalani (N.P.) and D.M. Nargolkar for the Respondents.

H

The Judgment of the Court was delivered by

AHMADI, J. Special leave granted. Heard counsel on both sides. The facts leading to this appeal are as under: A

On May 30, 1988, the respondent, a retired Naval Officer of the rank of Captain was apprehended at the Bombay International Airport (Sahar Airport) when he was about to take the Air-India Flight from Bombay to New York. On search of his luggage certain B highly sensitive documents marked secret/confidential were found. A complaint was lodged against him for the breach of the provisions of the Official Secrets Act, 1923 and the Atomic Energy Act, 1962. Soon after his arrest he filed an application dated 22nd September, 1988 for bail. That application was rejected by the High Court on 29th September, 1988. Thereafter, he filed a writ petition challenging the C validity of Sections 3 and 5 of the Official Secrets Act, 1923 but that writ petition was dismissed by a Division Bench of the Bombay High Court on 8th December, 1988. In the meantime, he had preferred an application dated 21st November, 1988 for transfer of his case to another learned Judge and for grant of bail. While granting the prayer for transfer the Division Bench refused to enlarge the respondent on D bail by its order dated 19th December, 1988. Soon thereafter on 18th January, 1989, the respondent filed the third application for bail which too was rejected by Suresh, J. Having thus failed to secure enlargement on bail the respondent approached the learned Sessions Judge, Bombay for a direction to the jail authorities that he be produced before the Head of the Orthopaedic Department of J.J. Hospital as he E had some spinal pain. The respondent also moved a separate application for being admitted to the Naval Hospital. The learned Sessions Judge acceded to his request and got him examined by Dr. Dongaonkar who submitted his report on 3rd February, 1989. On 10th February 1989, the respondent moved another application complaining of violation of Court's order and for enlargement on bail. This was F followed by yet another application for bail dated 16th February, 1989 and in the alternative for a direction to admit him to a suitable hospital where he may be served meals cooked at his home. On the said application certain directions were given and the respondent was shifted to the general ward of G.T. Hospital, Bombay. The Trial Court framed charges against the respondent on 27th February, 1989. On 24th April, G 1989, the respondent filed yet another application for grant of bail on medical grounds and in the alternative for being admitted to a hospital or any other place where he can conveniently receive instructions in yogic exercises. All his pending applications made for bail etc. were rejected by Puranik, J. by a common order dated 6th June, 1989, except Criminal Application No. 995 of 1989 preferred in April, 1989 H

A for enlargement on bail on medical grounds. Possibly the fact that he had referred this application was not brought to the notice of Puranik, J. Two days after the rejection of the group of bail applications by Puranik, J., application No. 995 of 1989 was disposed of by Suresh, J., who directed that he be enlarged on bail for a period of two months on his furnishing security in the sum of Rs. 10,000 with one surety on the B terms and conditions catalogued at (a) to (g) of the order. The learned Judge felt that by permitting him to be kept in virtual house arrest the State's grievance that he meets visitors including mediamen and gives interviews at the G.T. Hospital open ward will not survive. He was also of the view that having regard to his spinal disorder it was necessary that he had proper facilities for yogic exercises under expert guidance. It is this order of the learned Judge that is assailed before us by C the State of Maharashtra.

When this matter came up for admission before Shetty, J., during vacation, the learned Judge, after taking note of the fact that respondent was suffering from disc-prolapse for which he was treated D by Dr. Dongaonkar and had shown considerable improvement and after evaluating the opinion of Dr. Khadilkar who had certified that the respondent was fit to attend court, observed as under:

> "Having regard to the nature of the offences charged, the sickness or disability complained of, the nature of the treat- E ment required, the certificates given by the Doctors, I am of the opinion that the bail order made by the High Court appears to be a bit out of the ordinary."

The learned vacation Judge then directed notice to issue and stayed the operation of the High Court's Judgment of 8th June, 1989. While F doing so, he observed that the respondent should be given necessary treatment of Yogic exercises in the Jail. Therefore, since the passing of this order on 15th June, 1989, the operation of the High Court's order enlarging the respondent on bail and placing him in virtual house arrest on the terms and conditions set out in the court's order, is stayed.

G

The learned counsel for the State of Maharashtra contended that the learned Judge in the High Court while passing the impugned order of 8th June, 1989 ought to have realised that only two days before his colleague Puranik, J. had rejected all the pending bail applications (except Criminal Application No. 995/89) preferred at intervals by the H respondent. In Criminal Application No. 375/89 one of the prayers

made in paragraph 7(e) was as under:

> "That the applicant may, pending his illness be ordered and directed to be placed under house arrest and/or be released on bail on such terms and conditions as may be fit."

Puranik, J. considered this request of the respondent in paragraph 24 of his order of 6th June, 1989 and rejected the same. Despite the rejection of the said application No. 375 of 1989 along with a group of applications seeking enlargement on bail and other directions, Suresh, J. granted almost the same request only two days later while disposing of the application No. 995/89. That is what Shetty, J. described as 'a bit out of the ordinary' when the matter came up for hearing before this Court on 4th August, 1989 a communication received from the respondent requesting that he be brought to Delhi by plane to enable him to argue the matter in person was placed before the Court. This Court while rejecting his request for being brought by plane from Bombay to Delhi observed that he may inform the Court if he desired legal aid. At the next hearing instead of informing the Court whether he desired legal aid, he repeated his request for personal appearance through his son which was rejected. However, the Supreme Court Legal Aid Committee was requested to appoint an Advocate to appear and argue the case on his behalf. The matter was listed for hearing on 8th September, 1989.

When the matter was called on for hearing, Mr. Jethmalani, learned counsel for the respondent made a fervent plea that having regard to the age and the condition of the respondent, this Court should recall its earlier order staying the operation of the impugned order and should refuse to exercise its jurisdiction under Article 136 of the Constitution of India. The submission of Mr. Jethmalani was that ordinarily bail should be granted to undertrials and this Court should refrain from exercising jurisdiction under Article 136 to cancel bail granted by the High Court. He made an endeavour to satisfy us that even on merits this was a fit case for grant of bail notwithstanding the fact that several bail applications, made by the respondent one after another, were rejected by the High Court. We cannot accede to the submissions of Mr. Jethmalani.

It is evident from the facts stated above that after the respondent's successive applications for bail were spurned, he requested for being admitted to the hospital on medical grounds, that is, on the

A ground that he was suffering from spinal disorder. He was first admitted to the J.J. Hospital and was later shifted to G.T. Hospital open ward on his request. After improvement to the extent of 70% and above was reported by Dr. Dongaonkar who treated him and on Dr. Khadilkar declaring him fit to attend the court, he conteded that he had consulted a yoga instructor who advised him a course in yogic B exercises to get rid of his spinal disorder. In the meantime he had filed a number of applications for being released on bail. This batch of applications were put up before Puranik, J. for disposal. The attention of Puranik, J. was not drawn to the pendency of one such application No. 995/89 till he disposed of the batch of such bail applications on 6th June 1989. Even if the said application was filed after the hearing started before Puranik, J., the learned Judge could have been told C about its pendency before he rendered his decision on 6th June, 1989. This conduct of the respondent has given rise to the argument that the respondent desired to keep the question regarding his enalrgement on bail alive. We have pointed out that in one of the applications No. 375/89 he had sought precisely the same relief which came to be D granted by the impugned order. The question then is whether there was justification for releasing the respondent on bail to facilitate yogic exercises under expert guidance at his residence, albeit under conditions of surveillanc, even though Puranik, J. had rejected a more or less similar prayer only two days before? Should this Court refuse to exrcise jurisdiction under Article 136 of the Constitution even if it is E satisfied that the jurisdiction was wrongly exercised?

Liberty occupies a place of pride in our socio-political order. And who knew the value of liberty more than the founding fathers of our Constitution whose liberty was curtailed time and again under Draconian laws by the colonial rulers. That is why they provided in F Article 21 of the Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. It follows therefore that the personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of liberty of anti-social and anti-national elements. Article 22 casts G certain obligations on the authorities in the event of arrest of an individual accused of the commission of a crime against society or the Nation. In cases of undertrials charged with the commission of an offence or offences the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be made, mainly in non-bailable cases, having regard to the H nature of the crime, the circumstances in which it was committed, the

background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc. In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to the gravity of the offence alleged to have committed. One such application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Puranik, J. by a common order on 6th June, 1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995/89 otherwise he would have disposed it of by the very same common Order. Before the ink was dry on Puranik, J.'s order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J.; in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to reliase is that in Criminal Application No. 375 of 1989, the respondent had made an indentical request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J. only a couple of days before, in the absence of any substantial change in the fact-situation. 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 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 condusive to judicial discipline and would also

A B C D E F G H

A 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. For the above reasons we are of the view that there was no justification for passing the impugned order in the basence of a substantial change in the fact-situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint demands that we say no more.

B

It is true that ordinarily this Court does not interfere with an order granting bail but in the facts of this case we feel judicial discipline will be sacrificed at the altar of judicial discretion if we refuse to exercise our jurisdiction under Article 136 of the Constitution.

C

In the result we allow this appeal and set aside the impugned order dated 8th June, 1989 granting bail to the respondent-accused.

D

R.S.S. Appeal allowed.