Vineeth vs State Of Kerala on 1 October, 2015

Author: A.Hariprasad

Bench: A.Hariprasad

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY,THE 1ST DAY OF OCTOBER 2015/9TH ASWINA, 1937

Bail Appl..No. 5958 of 2015 ()

CRIME NO. 559/2015 OF PANDALAM POLICE STATION , PATHANAMTITTA

PETITIONER(S)/1ST ACCUSED:

VINEETH, S/O.VIJAYAN, AGED 27 YEARS
ELANJIKAL, MODIYIL, ELAVUMTHITTA P.O.,
PATHANAMTHITTA.

BY ADV. SRI.A.K.ALEX

RESPONDENT(S):

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.

BY PUBLIC PROSECUTOR MS.R.REMA

THIS BAILAPPLICATION HAVING COME UP FOR ADMISSION ON 01-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"C.R."

A.HARIPRASAD, J.

B.A. No.5958 of 2015

Dated this the 1st day of October, 2015

ORDER

Is it legal and proper for a person apprehending arrest in a non-bailable offence, whose application under Section 438 of the Code of Criminal Procedure, 1973 (in short, "Cr.P.C.") was dismissed by the High Court or the Court of Sessions, as the case may be, to approach the same court with successive applications seeking the relief without establishing any change in the circumstances? Is it proper on the part of the Court of Sessions to entertain a bail application filed by an accused after the dismissal of his previous application by the High Court? These questions of importance are raised in this petition.

2. Heard both sides.

3. This application by the petitioner, apprehending arrest in Crime No.559 of 2015 of Pandalam Police Station, is the third in succession. He, along with other accused, is involved in offences punishable under Sections 143, 144, 148, 149, 447, 323, 324 and 326 of the Indian Penal Code (in short, "IPC"). There are specific allegations against the petitioner that he was armed with a dangerous weapon, viz., an iron rod and he unleashed attack on the defacto complainant causing serious injuries.

4. The petitioner, along with other accused in the crime approached this Court for the first time with a bail application, B.A. No.2905 of 2015, seeking pre-arrest bail under Section 438 Cr.P.C. This Court, vide order dated 01.06.2015, considered the merit of the application elaborately and found that this petitioner and some other accused were not entitled to get any relief under Section 438 Cr.P.C. Prayers in that regard made by other accused had been allowed. Thereafter, this petitioner again moved this Court seeking a pre-arrest bail as per B.A.No.3981 of 2015. By order dated 13.07.2015, this Court dismissed the application finding that there was no subsequent development justifying the claim. Now the petitioner has again approached this Court with the application for the third time without mentioning any special reason for considering his plea under Section 438 Cr.P.C. I have no hesitation to hold that the attempt of the petitioner is nothing but an abuse of the process of court. It amounts to a forum hunt. I am also of a definite view that such an application, if entertained, will bring in disrepute only to the justice dispensation system. There is no doubt in my mind to hold that this application deserves only a dismissal. Reasons for substantiating my view are stated in the succeeding paragraphs as I wish to pronounce the law on the point.

5. Brief legislative history of the relevant provision will be useful. Under the old Cr.P.C., there was no specific provision for the grant of anticipatory bail. It was the view of several High Courts that unless a person was under restraint, ie., in legal custody, no bail could be granted. Therefore, the Law Commission in 41st report suggested for incorporating a provision for directing the release of a person on bail prior to his arrest (commonly known as anticipatory bail). Law Commission took note of the fact that necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes getting them detained in jail. It was also observed that in recent times with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false

cases, where there exist reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail, no justification could be seen in requiring him first to submit to custody, remain in prison for some days and then apply for bail. These are the observations made by the Law Commission while recommending the incorporation of Section 438 in the Cr.P.C.

6. Later, this provision underwent amendment by Cr.P.C. (Amendment) Act, 2005. Sub-section (1) of Section 438 Cr.P.C. has been substituted by the new Sub-sections (1), (1A) and (1B). First part of the Section sets out the conditions under which a person can make an application for anticipatory bail. It further says that the power to grant anticipatory bail should be exercised by the High Court or the Court of Sessions after taking into consideration certain circumstances. It recognizes the power of the court to issue an interim order for the grant of anticipatory bail. Secondly, if the court does not reject the application for grant of anticipatory bail and makes an interim order of bail, it should forthwith give notice to the Public Prosecutor and Superintendent of Police and the question of bail would be examined in the light of the respective contentions of the parties. Thirdly, the presence of the person seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of the final order, if on an application made by the Public Prosecutor reasons therefor are shown or the court considers that such presence is necessary in the interest of justice.

7. Sub-section (2) of Section 438 Cr.P.C. prescribes the conditions which should be attached to the order of bail, if the court deems fit to grant it in favour of the petitioner.

8. The court would grant or refuse anticipatory bail after taking into consideration the following factors, viz.,

(i) the nature and gravity of the accusation

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence

(iii) the possibility of the applicant fleeing from justice and

(iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him arrested. The list is not exhaustive. Judicial pronouncements are aplenty showing other factors. Depending on the facts and circumstances of each case, there can be other valid reasons requiring a consideration either for the grant or refusal of a pre-arrest bail. Supreme Court in Siddharam Satlingappa Mhetre v. State of Maharashtra (AIR 2011 SC 312) has enumerated certain factors and parameters that can be taken into consideration by the court while dealing with bail applications. Paragraph 122 reads as follows:

> "The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made; ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences. v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused; ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

Apex Court in a recent decision in Bhadresh Bipinbhai Sheth v. State of Gujarat and others (2015 (9) SCALE 403) re-stated and expatiated the principles in Siddharam Satlingappa Mhetre's case (above).

9. On a reading of Section 438 Cr.P.C., it is evident that special powers have been conferred only on the High Court and the Court of Sessions for directing a person to be released on bail previous to his arrest, which is commonly known as anticipatory bail. The fact is that when a court grants anticipatory bail what it does is to make an order that in the event of arrest, the person shall be released on bail. Manifestly, there is no question of release on bail unless a person is arrested and therefore it is only on arrest, the order granting anticipatory bail becomes operative.

10. The statement of law that there is no substantial difference between Sections 438 and 439 Cr.P.C. as regards the appreciation of the case, as to whether or not a bail is to be granted, is well settled. The principles that govern Section 439 Cr.P.C. as regards the maintainability of the application are also attracted to an application under Section 438 Cr.P.C.. However, Sections 438 and 439 Cr.P.C. do not overlap, inasmuch as they are meant for different purposes. For making an application in terms of Section 439 Cr.P.C., a person has to be in custody and for invoking the power under Section 438 Cr.P.C., a person need only apprehend arrest in a non-bailable offence.

11. Principles of law relating to grant of anticipatory bail have been clearly laid down by the Supreme Court in Gurbaksh Singh v. The State of Punjab (AIR 1980 SC 1632). The task undertaken by the Constitution Bench was to resolve the conflict between personal liberty and the investigational powers of Police. Supreme Court ruled that the court has power to impose conditions while granting anticipatory bail. In paragraph 33 of the decision, the Supreme Court observed as follows:

> "Therefore the High Court and the Court of Sessions should be left free to exercise their jurisdiction under S. 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application."

12. Supreme Court further held that the applicant seeking anticipatory bail must show that he has "reason to believe" that he may be arrested for a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere "fear" is not a "belief". Further, the Supreme Court deprecated the practice of granting blanket orders of anticipatory bail like "whenever arrested for whichever offence whatsoever".

13. Subsequent to this decision, so many decisions of the Apex Court by Benches of lesser strength have been pronounced. It is now well settled that the extraordinary powers of the High Court and the Court of Sessions to grant pre-arrest bail under Section 438 Cr.P.C. has to be exercised with a great amount of circumspection, prudence, care and caution.

14. I shall initially advert to the first question in this case regarding the legality and propriety of the successive bail applications. I shall firstly deal with the element of legality.

15. As a general rule, it can be stated that a second application for anticipatory bail is not barred. Even though the principle of res judicata is not directly applicable in a criminal case, especially in a bail application, there is a strong line of thinking that the courts are bound by the doctrine of judicial discipline. Therefore, the general proposition that a second bail application for pre-arrest bail is not legally barred is controlled by certain riders. Primarily, it has to be established by the applicant in the second application that there is a material change in the fact situation which makes him entitled to seek the relief. In otherwords, the applicant should establish a change in the

circumstances sufficient to persuade the court to invoke its extraordinary jurisdiction in favour of him. The change of circumstances can be in many ways. For example, his earlier application must have been disposed of by the court considering the submission of the Prosecutor that he was not involved in any offence at that time or that he was involved only in bailable offences. Another instance could be that the petitioner might have been accused of a non-bailable offence of a grave nature and therefore the court must have felt that his custodial interrogation was essential for a proper investigation. If the petitioner subsequently shows that though he is involved in a non-bailable offence, the gravity of the offence is much lesser than that had been initially alleged against him and there is no reason for any custodial interrogation, then he may legitimately claim a relief under Section 438 Cr.P.C. These are some of the instances the petitioner may rely on to urge that there is a material change in the fact situation enabling him to seek a pre-arrest bail through a subsequent application. In the absence of any such plea raised or fact established at the time of hearing, no doubt, an applicant is legally not entitled to seek pre-arrest bail by way of a second application.

16. Recently a learned Single Judge of this Court in Muhammed Ziyad v. State of Kerala & another (2015 (4) KLJ 22) has deprecated the practice of filing successive bail applications without any legal justification.

17. Full Bench of the Calcutta High Court in Sudip Sen v. State of W.B. (2010 Cri.L.J. 4628) reiterated the well settled principle that there is no general bar or impediment in moving a second application for bail, whether it be pre-arrest bail or regular bail. In paragraph 31 the court summed up the discussion. The point relevant for our purpose is quoted hereunder:

> "(c) A person will be entitled to move the High Court or the court of Session, as the case may be, for the second time. He can do so only on the ground of substantial change in the facts and circumstances of the case due to subsequent events. However, he will not be entitled to move the second application on the ground that the Court on earlier occasion failed to consider any particular aspect or material on record or that any point then available to him was not agitated before the Court."

(underline supplied) I am in respectful agreement with the view of the Full Bench.

18. Three Judge Bench of the Supreme Court in Kalyan Chandra Sarkar v. Rajesh Ranjan (AIR 2005 SC 921) considered the legality and propriety of successive bail applications. Relevant portion is quoted hereunder:

"19.The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-

ordinate bench must receive serious

consideration at the hands of the Court

entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application.

Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier including the Apex Court of the country."

19. In the light of the principles of law stated in the binding precedent by the Supreme Court, there cannot be any doubt that successive bail applications without showing any change in the fact situation or circumstance requiring the invocation of the extraordinary jurisdiction of the High Court or Court of Sessions under Section 438 Cr.P.C. can only be regarded as an abuse of the process of court.

20. The second point mentioned in the opening paragraph of this order deserves consideration in this context. The power under Section 438 Cr.P.C. is conferred on the High Court as well as on the Court of Sessions. It may be true that a person has a right to move either the High Court or the Court of Sessions for a pre-arrest bail under Section 438 Cr.P.C. at his option. However, there is a line of judicial pronouncements that where a person chooses to move the High Court at the first instance under Section 438 Cr.P.C. and his application is rejected, then he is precluded from moving the Court of Sessions on the same set of facts and circumstances for the second time. The intent and purport of the reasoning is mentioned by the Apex Court in Kalyan Chandra Sarkar's decision, viz., the doctrine of judicial discipline which has to be respected. Hierarchical system of the judiciary makes it obligatory on the part of the subordinate courts to consider the decision of the higher courts with due weight when the earlier application under Section 438 Cr.P.C. filed by the same petitioner was rejected.

21. Full Bench of the Calcutta High Court in Sudip Sen's case (supra) also held as follows:

> "(b) where a person chooses to straightway move the High Court in the first instance and his application is rejected on the same set of facts and circumstances, he will not be entitled to move the Court of Session for the second time, but may invoke the extraordinary powers of the Supreme Court by seeking special leave to appeal in the

> Supreme Court."

The said view is now beyond challenge. Therefore, I hold that once the High Court dismisses a bail application on merit after considering the relevant matters, the Court of Sessions cannot entertain a second application for bail by the same applicant. For the said reasons, I am fully convinced that this application is an abuse of the process of court and such practice should be curbed with all vehemence.

22. The decision of the Supreme Court in Shahzad Hasan Khan v. Ishtiaq Hassan Khan (AIR 1987 SC 1613) is to the effect that it would be appropriate and desirable that the subsequent bail applications should be placed before the same Judge who had passed the earlier order. It is based on certain principles. According to the Apex Court, it prevents abuse of the process of court inasmuch as an impression is not created that the litigant is shunning or selecting a court depending on whether the court is to his liking or not. In the same decision, the Supreme Court frowned on the practice of filing successive applications for bail without any new factor having cropped up. That decision was rendered in the peculiar facts and circumstances in that case. There may be practical difficulties in rigidly insisting that all the subsequent bail applications should be placed before the same Judge, who had dealt with the earlier bail application. There may be instances where the Judge might have retired or been transferred to another court. Other unforeseeable difficulties also may be there. However, if there is no such impediment, the principles stated by the Apex Court in Shahzad Hasan Khan's case will be a way out to avoid a forum shopping.

23. I shall now examine the propriety of the practice adopted in this case in the wake of rampant filing of such successive bail applications without any legal justification. Change of circumstance or change in the fact situation does not imply a change in the roaster or a change in the persona of the Judge or a change of the advocate filing the bail application. Learned members of the legal profession has a prominent role in checking this obnoxious practise by certain unscrupulous litigants. Justice V.R.Krishna Iyer speaking for a four Judge Bench in Bar Council of Maharashtra v. M.V.Dabholkar (AIR 1976 SC 242) stated thus:

> "The central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice-social justice. ....."

Provisions in the Advocates Act, 1961 and the rules made by the Bar Council of India on Standard of Professional Conduct and Etiquette clearly show the responsibility of the lawyer community in maintaining the dignity and might of the institutions administering justice. High moral tone and adherence to the canons of ethics are naturally expected from lawyers for the healthy upkeep of the system. It is therefore incumbent on the gentle and erudite members of the noble profession to prevent such practices of unscrupulous, unprincipled, exploitative and cunning litigants.

24. Every party seeking justice has a legal and moral responsibility to place the entire facts before the court. Placement of the entire facts is highly essential for a proper and correct decision of the litigation. Non- production of orders passed in the earlier bail application/applications can only be viewed as suppression of material facts disentitling a discretionary relief. Non-mentioning of any change in the circumstances warranting a re- look in the matter can only result in rejection of the plea. These are certain basic aspects to be reckoned with.

25. To sum up, I hold that the plea raised by the applicant is nothing but an abuse of the process of court. I shall stop by saying that this Court is not powerless to curb such nefarious and detestable practices of the unscrupulous litigants by imposing exemplary costs/penalty and also by passing such other orders to keep up the might, dignity and honour of the Court. However, I refrain from doing so in this case.

In the result, the application is dismissed.

A. HARIPRASAD, JUDGE.

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