
(2016) 09 KL CK 0004
In the High Court Of Kerala
Case No : Bail Appl. No. 797 of 2015

Firos Ali

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-09-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439

Citation : (2017) 169 AIC 327 : (2017) 1 AICLR 21 : (2017) ALLMRCri 49 : (2016) 4 CriCC 345 : (2017) CriLJ 478 : (2016) 4 ILRKerala 73 : (2016) 4 KerLJ 346 : (2016) 4 KLT 150 : (2016) 3 MadWNCri 275 : (2016) 4 RCRCriminal 799

Hon'ble Judges : Mohan M. Shantanagoudar, ACJ , Thottathil B. Radhakrishnan and K.T. Sankaran, JJ.

Bench : Full Bench

Advocate : Sri. Nireesh Mathew, Advocate, for the Petitioner; Public Prosecutor, for the Respondent

Final Decision : Disposed Off

Judgement

Mohan M. Shantanagoudar, Actg. C.J.—;The Apex Court, in the case of Shahzad Hasan Khan v. Ishtiaq Hasan Khan [AIR 1987 SC 1613(1)], while taking notice of the fact that successive bail applications are being filed by the same accused in the same crime, held that the long standing convention and judicial discipline requiring the bail application/applications subsequently filed shall be placed before the learned Judge who passed orders on the bail application filed earlier need to be followed. It was observed further in the same matter thus:

"5. The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court in as much as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. 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 there would be wastage of court orders."

2. From the aforementioned observations of the Apex Court, it is amply clear that in order to prevent abuse of the process of court and to prohibit the litigant from forum shopping in selecting the court depending on whether the court is to his liking or not and in order to discourage the filing of successive bail applications without any new factor having cropped up, the successive bail applications in the same crime by the same accused shall be placed before the same Judge who has disposed of the earlier bail application, if such learned Judge is available for orders. If such a procedure is adopted, conflicting orders could also be avoided.

3. The ratio laid down in the aforementioned judgment is reiterated by the Apex Court in the judgment in *State of Maharashtra v. Captain Buddhikota Subha Rao* [AIR 1989 SC 2292] equivalent to [(1989) Supp. (2) SCC 605] wherein, it is observed thus:

"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 in as much 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 dispatch. It will also result in consistency."

4. The aforementioned two judgments are referred with approval in *Jagmohan Bahl v. State (NCT of Delhi)* [2014 (14) SCALE 224] wherein it is observed thus:

"On a perusal of the aforesaid authorities, it is clear to us that the learned Judge, who has declined to entertain the prayer for grant of bail, if available, should hear the second bail application or the successive bail applications. It is in consonance with the principle of judicial decorum, discipline and propriety. Needless to say, unless such principle is adhered to, there is enormous possibility of forum-shopping which has no sanction in law and definitely, has no sanctity. If the same is allowed to prevail, it is likely to usher in anarchy, whim and caprice and in the ultimate eventuate shake the faith in the adjudicating system. This cannot be allowed to be encouraged."

It was further observed by the Apex Court in *Jagmohan Bahl* (supra) that it was the duty of the prosecution to bring to the notice of the Judge concerned that such a bail application was rejected earlier by a different Judge and that he was available for orders. While concluding so, their Lordships have observed as under:

"The matter would be different if a Judge has demitted the office or has been transferred.

Similarly, in the trial Court, the matter would stand on a different footing, if the Presiding Officer has been superannuated or transferred. The fundamental concept is, if the Judge is available, the matter should be heard by him. That will sustain the faith of the people in the system and nobody would pave the path of forum-shopping, which is decryable in law."

5. The result of aforementioned successive pronouncements of the Apex Court is that the judicial discipline requires that if successive bail applications are filed by the same accused, in the same crime, the matter must be placed before the same Judge who disposed of the earlier application, if he is available for orders, in order to prevent abuse of the process of court; to prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking; to save time of the court as a Judge familiar with the facts will be able to dispose of the subsequent application/ applications effectively and as the same would be conducive to judicial discipline.

There cannot be any dispute that the litigants cannot be engaged in forum shopping in as much as if allowed, the same would lead to injustice and travesty of justice.

6. However, the Registry of this Court is faced with certain doubts in carrying out the dictum laid down by the Apex Court in view of certain orders on the judicial side by learned Judges, which can be summarised as under:

1. Successive Bail Applications are ordered to be posted before the same Judge if he is "available" for orders. But the term "available" is not defined anywhere. It is to be decided whether a Honorable Judge sitting in Division Bench can be considered as "available for orders".

2. It is also to be considered as to whether during Summer, Onam and Christmas holidays when only limited number of courts are holding sittings, the bail applications can be posted as per roster in case where the Hon"ble Judge who passed the earlier order in bail application is not sitting during the holidays, considering that the Hon"ble Judge who passed the earlier order on the bail application is "not available for orders".

3. Another doubt is as to whether "the same subject matter" takes in its fold, the bail application filed earlier by the co-accused also.

If so, necessary directions are also to be issued to the litigants and lawyers to indicate the same in their Bail Application which may not be practical.

7. This Full Bench is specially constituted to clear the doubts which have arisen in the mind of the Registry and in order to effectively implement the dictum laid down by the Apex Court mentioned supra in the matter of deciding the bail applications.

8. We have heard the learned counsel on the subject. During the process of argument, it is brought to the notice of the Full Bench that if the learned Judge who passed orders on an earlier bail application is on long leave for more than one month or so, can it be said that the very learned Judge who passed the earlier order should hear the subsequent bail application and consequently, as to whether such application shall not be heard till the very learned Judge is available for orders. According to the learned counsel, the learned Judge who passed orders on an earlier application for bail cannot be said to be available for orders if he is on long leave or if he is not sitting during summer vacation or Onam and Christmas holidays or if he is retired or transferred.

It is further argued that the Registry may not know about the disposal of any bail application made on the same subject earlier and in that event, the Registry may place the subsequent bail application/applications before another Judge as per the roster inadvertently.

The doubt is also raised before the court by the advocates as to the meaning of "same subject" as used by the Apex Court in the case of Shahzad Hasan Khan (supra) while lamenting that "if the successive applications filed on the same subject are permitted to be disposed of by other learned Judges, there would be conflicting orders etc." Learned advocates have raised a doubt as to whether the words "same subject" refer to the same crime or the same accused.

Lastly, it is contended at the Bar that in case a bail application is filed by a co-accused in the same crime, whether such application need be placed before the very learned Judge who has considered and disposed of the bail application filed by another accused earlier.

9. Nobody can possibly say that the learned Judge who passed earlier orders on a bail application, if retired or transferred, shall consider the subsequent bail application on the same subject even after his retirement or transfer. Naturally, in such an event, the subsequent bail applications need be placed for consideration before the learned Judge who is having the roster.

10. Generally summer vacation is of four to five weeks whereas Onam and Christmas holidays are of one week each. If a subsequent bail application is filed by the same accused during summer vacation or during Onam and Christmas holidays and if the learned Judge who passed the order on an earlier application for bail at the first instance is not designated as a vacation Judge, then, it may be difficult to follow the dictum laid down by the Apex Court as mentioned supra fully in its letter and spirit. We cannot lose sight of the fact that in case an application for bail is filed, the same needs to be heard and decided as early as possible in as much as the liberty of a person is of utmost importance and that if an innocent person is put behind the bars without any valid reason, the same would affect his fundamental right to live. However, we cannot also lose sight of the fact that in case if a subsequent bail application is filed by the same accused, the Public Prosecutor would normally pray for some time to get the investigation

records and to file objections in order to have his say in the matter. Such process may take one week or at least five to six days. Since the Onam and Christmas holidays would be around one week each, the bail application subsequently filed may be posted after Onam or Christmas holidays before the same learned Judge who had considered the application for bail filed earlier by the same accused, if the Judge concerned is not designated as a Vacation Judge during Onam or Christmas holidays.

11. However, difficulty may arise if the learned Judge who passed the earlier orders on the bail application is not available for orders during the summer vacation, or if he is not a designated Vacation Judge during summer vacation. Since the liberty of the person is of utmost importance, the subsequent application filed by the accused, though his earlier application for bail is rejected by a different Judge, may be considered by the learned Judge who is designated as Vacation Judge during the relevant point of time. However, before posting of the application before court, it is necessary on the part of the Registry to bring to the notice of the Vacation Judge about the factum of disposal of an earlier bail application on the same subject by another learned Judge. When bail applications are filed before the vacation court, the memos filed under Section 8 of the High Court Act could be listed before the Hon"ble Judge nominated to hear the bail applications. The fact that earlier bail application of the same applicant was rejected shall be brought to the notice of that Hon"ble Judge. Thereafter, it is open for the Vacation Judge concerned either to get the matter listed before him or refuse to do so. That is, the discretion rests on the Vacation Judge to take a decision, either to hear or to direct the Registry to place the application after vacation before the very learned Judge who has rejected the application for bail at an earlier point of time.

12. There cannot be any dispute that the subsequent bail application is not maintainable if there is no change of circumstance. So also, it is necessary that the applicant shall clearly mention in his subsequent bail application and to bring to the notice of the court about the earlier orders passed on his earlier applications so as to enable the Registry to note the gist of the orders as well as to note the same on the docket of the judges papers while submitting before the Bench for hearing. This process would avoid forum shopping.

13. In case, if the learned Judge who passed orders on an earlier bail application is sitting in the Division Bench, the Registry may bring such factor to the notice of the Hon"ble the Chief Justice so as to enable the Hon"ble the chief Justice to pass appropriate orders regarding posting of the matter before the very learned Judge, in order to facilitate such learned Judge to hear and pass orders on the subsequent bail application.

14. Regarding the doubt as to whether the "same subject matter" takes in its fold the bail application filed earlier by a co-accused also, we are of the considered opinion that the subject matter differs not only from case to case but also from accused to accused. The subject matter pertaining to accused No.1

may totally be different from the subject matter of accused Nos.2, 3 etc. in the same crime. Let us take the example of a crime committed by 4 accused. In the said crime, accused No.1 may have committed the crime by assaulting the victim with chopper or sickle, the second accused may have assaulted the victim without weapon, the third accused may have instigated the other accused to commit the crime and the fourth accused may have the allegation of scolding the victim when the incident was taking place. In such a case, the subject matter of each of the 4 accused is different. The rejection of the application for bail filed by the first accused may or may not be the ground for rejection of the bail application of the other accused. The order passed on the application for bail in the case of one accused may or may not be relevant while considering the application for bail filed by other accused. In this view of the matter, it is not necessary to place application/applications by the co-accused before the very learned Judge for orders who had passed order on the bail application filed by another accused. The application/applications filed by co-accused may be heard by a different Judge having roster.

15. If the application for bail is filed by the co-accused, as aforementioned, it may come before another learned Judge for consideration and orders. In that event, the Registry as well as the advocate appearing on behalf of the co-accused may or may not be having knowledge about the filing of the bail application by another accused. In some cases, the subject matter relating to one accused may almost be similar to the subject matter of the co-accused. In this view of the matter, it would be beneficial for the Judge who would be hearing the bail application filed by the co-accused to know about the order earlier passed in respect of another accused almost on the same or similar subject matter. Since the Public Prosecutor in both the bail applications would be common, as far as possible, it is necessary on his part to bring to the notice of the learned Judge who would be hearing the bail application of the co-accused about the passing of earlier orders on the bail application filed by another accused.

16. Having regard to the aforementioned discussion on the subject, we issue the following guidelines:

- a) The subsequent bail application by the same accused will be entertained only if there is change of circumstance for filing such application.
- b) Subsequent bail application filed by the same accused shall be heard by the learned Judge who has considered and passed orders on the earlier bail application/applications in the same crime.
- c) The application filed by the co-accused may be considered and ordered by any other learned Judge having roster during the relevant point of time and such application need not be placed before the Judge who passed orders earlier on the application filed by another accused.
- d) The subsequent bail application filed by the same accused in the same crime

during Onam and Christmas holidays may wait for orders till the end of the said holidays, in case, if the learned Judge who has passed orders on the earlier application is not available for orders during those holidays or if he is not designated as a Vacation Judge.

e) In case if the subsequent bail application is filed by the same accused during summer vacation and if the learned Judge who passed earlier order is not available for orders or if he is not a designated Vacation Judge, the memo filed under section 8 of the High Court Act on behalf of the accused-applicant be listed before the learned Judge nominated to hear the bail applications during the summer vacation. However, the fact that an earlier bail application in the same crime is dismissed is to be brought to the notice of that Vacation Judge. The factor of listing the matter during summer vacation or refusing to do so can be decided by the learned Vacation Judge sitting in summer vacation.

f) If the learned Judge who passed order on the earlier bail application filed by the same accused in the same crime is sitting in the Division Bench, the subsequent application for bail may be brought to the notice of the Hon''ble the Chief Justice by the Registry so as to enable the Hon''ble the Chief Justice to make necessary arrangement to have a special sitting of the said learned Judge.

g) The counsel for the accused who is filing the subsequent application for bail in the same crime shall mention in the application seeking bail about the disposal of earlier bail application filed by this very accused. A copy of the order passed on such application earlier in respect of the same accused shall also be produced along with the second or successive bail applications.

h) It is the duty of the Public Prosecutor concerned to bring to the notice of the court, as far as possible, about the earlier bail application filed by the same accused as well as about any application filed by the co-accused in the same crime and the result thereof, either by filing the statement of objections or at least at the time of arguments on the bail application.

17. Ordered accordingly.