

Court No. - 64

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 26660 of 2024

Applicant :- Firoz

Opposite Party :- State of U.P.

Counsel for Applicant :- Chandra Bhushan Prasad, Firoz Ahmad Khan

Counsel for Opposite Party :- Deepak Sharma, G.A.

Hon'ble Samit Gopal, J.

1. List revised.

2. Heard Sri Chandra Bhushan Prasad, learned counsel for the applicant, Sri Anand Mohan Pandey holding brief of Sri Deepak Sharma, learned counsel for the first informant, Sri Bade Lal Bind, learned counsel for the State and perused the material on record.

3. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant-Firoz, seeking enlargement on bail during trial in connection with S.T. No.1576 of 2022, Case Crime No. 90 of 2019, under Sections 498-A, 323, 506, 376 IPC and Section 3/4 D.P. Act, registered at Police Station Mahila Thana, District Aligarh.

4. This is a third bail application. The first bail application of the applicant was rejected vide order dated 25.11.2021 passed by this Court passed in Criminal Misc. Bail Application No. 47610 of 2021. Thereafter the second bail application of the applicant was rejected vide order dated 21.11.2023 passed by this Court passed in Criminal Misc. Bail Application No.7134 of 2023.

5. Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. It is argued that the trial in the present matter is pending and as of now six witnesses have been examined. The 3rd supplementary affidavit dated 20.3.2025 has been placed before the Court in which the statements of P.W.5 and P.W.6 have been annexed. The applicant is in jail since 23.12.2023 and since only six witnesses have been examined, the trial would take time. Looking to the period of detention of the applicant and the delay in trial, the present bail application be allowed. It has also been pointed out that the applicant is not having any criminal history as stated in para 4 of the affidavit.

6. Per contra learned counsel for the first informant vehemently opposed the prayer for bail and argued that the first bail application and second bail application of the applicant have been rejected by this Court on merits by a detailed orders. The trial in the matter is in progress and there is no delay in it. It is argued that prosecution witnesses are appearing diligently before the trial court and giving their testimony as would itself appear from the fact that six prosecution witnesses have been

examined and now the testimony of only one formal witness remains to be recorded. The trial this is at an advance stage and grant of bail at this stage may have an adverse effect in the trial. Learned counsel for the State has also been heard. He assures the Court that the testimony of formal witnesses shall be recorded forthwith without any unnecessary delay for which if needed, the same will be done through video conferencing.

7. After hearing the counsel for the parties and perusing the record, it is evident that the first bail application of the applicant was rejected by this Court vide order dated 25.11.2021, the said order reads as under:-

"Heard Sri Ashwani Mishra, Advocate holding brief of Sri Ashutosh Kumar Mishra, learned counsel for the applicant, Sri B.B. Upadhyay, learned A.G.A. for the State and perused the material on record.

This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant Firoz, seeking enlargement on bail during trial in connection with Case Crime No. 90 of 2019, under Sections 498A, 323, 506, 376 I.P.C. and 3/4 D.P. Act, registered at P.S. Mahila Thana, District Aligarh.

The prosecution case as per the F.I.R. lodged on 4.10.2019 at about 12:37 hours, by the prosecutrix, is that she is married to Javed the brother of the applicant on 25.4.2015. There was demand of dowry in the shape of Rs. 1 lakh and one buffalo. The accused persons being seven in number including the applicant used to torture and harass her for their demand of dowry. From the wedlock two children were born. There was a dispute between the first informant and the accused persons, after which an F.I.R. was lodged by her as Case Crime No. 491 of 2018, under Sections 323, 504, 506 I.P.C. and Section 3/4 D.P. Act which was later on settled in the Mediation Centre at Aligarh. On 25.1.2019 the applicant Firoz entered in the room of the first informant and raped her when her husband was out from the house. He husband had enticed away a girl for which a case has been registered being Case Crime No. 362 of 2019, under Sections 366, 506 I.P.C. at Police Station Kotwali Nagar. The first informant is being harassed and tortured and assaulted due to demand of dowry.

Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. He is devar of the first informant and naming of the applicant in the present case is with malafide intention only because of the reason of matrimonial discord between the first informant and her husband. It is argued that no such incident as alleged has taken place. The applicant was not present at the place of occurrence and was in Jaipur, Rajasthan. It is argued that the said argument was taken before the trial court in the bail application of the applicant. It is argued that the first informant has refused her medical examination when she was produced before the doctor and as such allegation has no corroboration from the medical evidence. The applicant is in jail since 23.12.2020.

Per contra, learned A.G.A. opposed the prayer for bail and argued that although the applicant is devar of the prosecutrix but there is allegation of his committing rape upon her. It is argued that there is no reason for false implication of the applicant only in so far as the allegation of rape is concerned. It is argued that the prosecutrix has levelled allegation against the applicant of his committing rape on her.

After having heard learned counsels for the parties and perusing the record, it is apparent that the applicant is named in the F.I.R. There is specific allegation of committing rape upon the

prosecutrix by the applicant when her husband was away from house. There is no reason for false implication of the applicant only with the allegation of rape being committed by him.

Looking to fact and circumstances of the case, nature of evidence and gravity of offence, I do not find it a fit case to release the applicant on bail.

Accordingly, the bail application is rejected."

8. Thereafter the second bail application of the applicant was rejected by this Court vide order dated 21.11.2023, the said order reads as under:-

"1. List revised.

2. Heard Sri Ali Bin Saif, learned counsel for the applicant, Sri Anand Mohan Pandey holding brief of Sri Deepak Sharma, learned counsel for the first informant, Sri Ajay Singh, learned A.G.A-1 for the State and perused the material on record.

3. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant-Firoz, seeking enlargement on bail during trial in connection with S.T. No.1576 of 2022, Case Crime No. 90 of 2019, under Sections 498-A, 323, 506, 376 IPC and Section 3/4 D.P. Act, registered at Police Station Mahila Thana, District Aligarh.

4. This is a second bail application. The first bail application of the applicant was rejected vide order dated 25.11.2021 passed by this Court passed in Criminal Misc. Bail Application No. 47610 of 2021.

5. Learned counsel for the applicant argued that although the first bail application of the applicant has been rejected but there were certain facts and grounds available which were not taken and hence the same are being taken in the present second bail application and argued. While placing para 11, 12, 14, 25, 26 and 27 of the affidavit it is argued that the versions given by the victim during investigation are totally false and concocted. It is argued that trial in the present matter is delayed on account of victim herself as she failed to appear before the trial court for two years and after adopting coercive measures by the trial court, the victim appeared before it and her statement was recorded as P.W.1 which is annexed as S.A-1 to the supplementary affidavit dated 16.3.2023. While placing said statement, it is argued that there are contradictions in the said statements of the victim which would go to show that the case is of false implication. It is argued that there was an inordinate delay due to her non-appearance before the trial court and as such the applicant has been made to suffer irreparably. The applicant is in jail since 23.12.2020.

6. Per contra learned counsel for the first informant and learned counsel for the State vehemently opposed the prayer for bail and argued that the present bail application is the second bail application. There is no new and fresh ground available to the applicant. In so far as the ground relating to the statements of the victim during investigation is concerned, the same has already been considered in the first bail application. The statement of the victim recorded in trial cannot be appreciated at this stage in an application under Section 439 Cr.P.C. and a finding be returned regarding the veracity of the same as the same is to be considered by the trial court at the appropriate stage, as such bail application of the applicant be rejected.

7. After hearing the counsel for the parties and perusing the record, it is evident that the present bail application is the second bail application. The first bail application was rejected vide order dated 25.11.2021, the said order reads as under:-

"Heard Sri Ashwani Mishra, Advocate holding brief of Sri Ashutosh Kumar Mishra, learned counsel for the applicant, Sri B.B. Upadhyay, learned A.G.A. for the State and perused the material on record.

This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant Firoz, seeking enlargement on bail during trial in connection with Case Crime No. 90 of 2019, under Sections 498A, 323, 506, 376 I.P.C. and 3/4 D.P. Act, registered at P.S. Mahila Thana, District Aligarh.

The prosecution case as per the F.I.R. lodged on 4.10.2019 at about 12:37 hours, by the prosecutrix, is that she is married to Javed the brother of the applicant on 25.4.2015. There was demand of dowry in the shape of Rs. 1 lakh and one buffalo. The accused persons being seven in number including the applicant used to torture and harass her for their demand of dowry. From the wedlock two children were born. There was a dispute between the first informant and the accused persons, after which an F.I.R. was lodged by her as Case Crime No. 491 of 2018, under Sections 323, 504, 506 I.P.C. and Section 3/4 D.P. Act which was later on settled in the Mediation Centre at Aligarh. On 25.1.2019 the applicant Firoz entered in the room of the first informant and raped her when her husband was out from the house. He husband had enticed away a girl for which a case has been registered being Case Crime No. 362 of 2019, under Sections 366, 506 I.P.C. at Police Station Kotwali Nagar. The first informant is being harassed and tortured and assaulted due to demand of dowry.

Learned counsel for the applicant argued that the applicant has been falsely implicated in the present case. He is devar of the first informant and naming of the applicant in the present case is with malafide intention only because of the reason of matrimonial discord between the first informant and her husband. It is argued that no such incident as alleged has taken place. The applicant was not present at the place of occurrence and was in Jaipur, Rajasthan. It is argued that the said argument was taken before the trial court in the bail application of the applicant. It is argued that the first informant has refused her medical examination when she was produced before the doctor and as such allegation has no corroboration from the medical evidence. The applicant is in jail since 23.12.2020.

Per contra, learned A.G.A. opposed the prayer for bail and argued that although the applicant is devar of the prosecutrix but there is allegation of his committing rape upon her. It is argued that there is no reason for false implication of the applicant only in so far as the allegation of rape is concerned. It is argued that the prosecutrix has levelled allegation against the applicant of his committing rape on her.

After having heard learned counsels for the parties and perusing the record, it is apparent that the applicant is named in the F.I.R. There is specific allegation of committing rape upon the prosecutrix by the applicant when her husband was away from house. There is no reason for false implication of the applicant only with the allegation of rape being committed by him.

Looking to fact and circumstances of the case, nature of evidence and gravity of offence, I do not find it a fit case to release the applicant on bail.

Accordingly, the bail application is rejected."

8. In so far as the appreciation of statement of the victim recorded before the trial court is concerned, the same cannot be looked into as it is the dominion of the trial court to examine it. In so far as the ground relating to statements of the victim during investigation are concerned, the same were during investigation and were available at the time of first bail application. This Court in Criminal Misc. Bail Application No.53377 of 2022 (Raj Karan Patel Vs. State of U.P.)

decided on 17.05.2023 has held as follows in paras 13 to 21:-

"13. Although a second bail application on behalf of the accused is not barred and is maintainable but considerations of the grounds of bail are the factors to be taken into account in it. A second bail application is always considered on fresh and new grounds available to the accused after rejection of the first bail application. It cannot be said that a second bail application would not be maintainable. The maintainability of such bail application is there but consideration of the prayer for bail is subject to the availability of fresh and new grounds which if not available would render reviewing the earlier order rejecting the bail application. In the case of Babu Singh (supra), the Court was considering a bail application of an accused who was acquitted by the Sessions Court against which the State had filed an appeal against acquittal in the High Court which was successful and the findings of the Sessions Judge were reversed holding the accused persons guilty and sentencing them for the offences. Against the said judgment and order of the High Court, a statutory appeal was carried to the Apex Court. Before the Apex Court, a second bail application was filed which was the consideration in which the said judgment and order has been passed. The Apex Court with regards to the maintainability of a second bail application held that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations.

14. The Division Bench of this Court in the case of Dal Chand (supra) was deciding a reference made by a single Judge Bench as to whether a second bail application at the instance of a convicted accused in a pending appeal, is maintainable or not.

15. The Division Bench vide the said judgment and order while answering the reference and relying upon the judgment of the Apex Court in the case of Babu Singh (supra) held that a second application for bail at the instance of a convicted accused, is maintainable in a criminal appeal.

16. In so far as the part of the maintainability of a second bail application is concerned, it is no more res-integra that the same is maintainable. The question which arises is whether without any fresh new and changed circumstances, a Court should consider a subsequent bail application ignoring its previous order rejecting the previous bail application or not.

17. In the opinion of the Court, the same would not be possible. A subsequent bail application is maintainable but consideration of the prayer of bail would depend on the facts as to whether fresh and new grounds have been pleaded and are available or not.

18. In the case of State of Maharashtra Vs. Buddhikota Subha Rao : 1989 Supp (2) SCC 605 it has been held by the Apex Court that once a bail application was rejected there was no question of granting a similar prayer. Granting it would be virtually overruling the earlier decision without there being a change in the fact-situation. A substantial change is one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. It has been held as under :-

"7. 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 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 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 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 been 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 6-6-1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995 of 1989 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 realise is that in Criminal Application No. 375 of 1989, the respondent had made an identical 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 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 their view that we take we are fortified by the observations of this Court in para 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 absence 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.

(emphasis supplied)

19. A Division Bench of this Court in the case of *Satya Pal Vs. State of U.P.* : 1998 SCC OnLine All 1224 : (1998) 37 ACC 287 was deciding a question referred to by a single Judge Bench whether a fresh argument which was available earlier should be allowed to be advanced in a second bail application. The question as before the Division Bench was as follows :-

"1. The following question has been referred by learned single Judge to be decided by this Court:

"Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected".

The Division Bench held that a fresh argument in a second bail application cannot be allowed to be advanced on those very facts which were available to the accused at the time of the moving and rejection of the first bail application. The answer as given to the referred question is as follows :-

"9. Accordingly our answer to the question referred is that fresh arguments in a second bail application for an accused cannot be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected."

20. The Apex Court in the case of *State of M.P. Vs. Kajad* : (2001) 7 SCC 673 has held that although successive bail applications are permissible but under changed circumstances. It has been held as under :-

"8. It has further to be noted that the factum of the rejection of his earlier bail application bearing Miscellaneous Case No. 2052 of 2000 on 5-6-2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in *Hari Singh Mann v. Harbhajan Singh Bajwa* [(2001) 1 SCC 169 : 2001 SCC (Cri) 113] and various other judgments."

21. Further, the Apex Court in the case of *Kalyan Chandra Sarkar Vs. Rajesh*

Ranjan : (2005) 2 SCC 42 has held that subsequent bail application can be filed if there is a change in the fact situation or law which would render the previous view obsolete. The Court rejected the argument that successive bail application can be filed on a ground already rejected by courts earlier and it would not be violative of Article 21 of the Constitution of India. It has been held as under :-

"8. On 23-9-2002 the accused-respondent moved the eighth bail application which came to be allowed by the High Court by its order dated 23-5-2003 solely on the ground that the accused-respondent had undergone incarceration for a period of 3 years and that there was no likelihood of the trial being concluded in the near future and an appeal filed against the said grant of bail came to be allowed [Ed.: In Kalyan Chandra Sarkar v. Rajesh Ranjan, op. cit. fn. 2, above] on the ground that the High Court could not have allowed the bail application on the sole ground of delay in the conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of prima facie case, gravity of offence, and the allegation of tampering with the witness by threat and inducement when on bail. This Court held [Ed.: In Kalyan Chandra Sarkar v. Rajesh Ranjan, op. cit. fn. 2, above] that since the above factors go to the root of the right of the accused to seek bail, non-consideration of the same and grant of bail solely on the ground of long incarceration vitiated the order of the High Court granting bail. This Court also observed that though an accused had a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also has a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications. This Court in that order also found fault with the High Court for not recording any fresh grounds while granting bail and for not taking into consideration the basis on which earlier bail applications were rejected. The Court also emphasised in the said order that ignoring the earlier orders of this Court is violative of the principle of binding nature of the judgments of the superior court rendered in a lis between the same parties, and noted that such approach of the High Court in effect amounts to ignoring or overruling and thus rendering ineffective the principles enunciated in the earlier orders especially of the superior courts. On that basis, the appeal of the complainant challenging the grant of bail came to be allowed cancelling the bail granted to the respondent. This order of this Court is reported as Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977]."

"20. The decisions given by a superior forum, undoubtedly, are 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 of the guarantee

conferred on a person under Article 21 of the Constitution, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by the courts earlier, including the Apex Court of the country."

(emphasis supplied)"

9. The trial in the present matter is going on in which the testimony of all the witnesses of fact being six in number has been recorded and only one formal witness remains to be examined. Learned counsel for the State assures the Court that his testimony shall be recorded at the earliest and if needed, the same shall be recorded through video conferencing. The release of the applicant at this stage would not be in the fitness of things as being have an adverse effect in trial.

10. Looking to the facts and circumstances of the case, I do not find it a fit case for bail, hence, the bail application is **rejected**.

11. However, it is provided that the applicant may file an application for expeditious disposal of the trial of the case before the court concerned within two weeks from today, which may as per its load of work, diary and pendency of cases, pass appropriate orders on the same.

(Samit Gopal, J.)

Order Date :- 5.5.2025
Gaurav Kuls