



IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment delivered on: 14th July, 2023**

+ **BAIL APPLN. 2064/2023**

HARISH TIWARI

..... Applicant

versus

STATE OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Mohit Mathur, Senior Advocate with Mr. Pranav Mehta, Mr. Aseem Atwal and Mr. Harsh Gautam, Advs.

For the Respondent : Mr. Manjeet Arya, APP for the State with Inspector Manjeet Singh, PS Punjabi Bagh.
Mr. Anupam S. Sharma, Mr. Pankaj Gupta, Mr. Prakarsh Airan, Ms. Harpreet Kalsi, Mr. Ripudaman Sharma and Mr. Abhishek Batra, Advs. for the Complainant.

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HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

AMIT MAHAJAN, J

CRL.M.A. 16502/2023 *(exemption from filing certified / legible copies, true typed / translated copies with proper margins of the annexures)*

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.



BAIL APPLN. 2064/2023 & CRL.M.A. 16501/2023

3. The applicant has filed the present application under Section 439 of the Code of Criminal Procedure, 1973 (“**Cr.P.C.**”) read with Section 436-A of the Cr.P.C. praying, *inter alia*, for the grant of regular bail in FIR No. 495/2017, dated 16.09.2017 under Sections 384/389/411/120-B/34 of the Indian Penal Code, 1860 (**IPC**), registered at police station Punjabi Bagh, Delhi.

Brief Facts

4. The FIR was registered on a complaint given by one Mr. Basudev Agarwal against the applicant/ accused and others alleging the extortion of huge amounts of money from the complainant over the period of 12-13 years.

5. It was alleged that accused persons have done this on the pretext of implicating the complainant in false and frivolous criminal cases and also defaming him publicly.

6. It was alleged that accused persons, were blackmailing the complainant in order to commit extortion by threatening to bring into the public domain, some fake, doctored and morphed photos and video clippings which reportedly showed the complainant in very awkward and embarrassed positions with certain women. The complainant alleged that about 13-14 years back, the applicant came to the office of the complainant and introduced himself as an advocate/legal advisor. After a few months, the applicant falsely represented to the complainant that he had met with one lady in possession of some objectionable documents and suggested the



complainant to pay a small amount in order to protect his reputation and to avoid any unnecessary tarnishing of his image.

7. It was further alleged that the applicant then started introducing the complainant to different extortionists at varied intervals under the same context, one of which is Mr. Subhash Sharma who is also a member of the black mailer's gang and had on earlier occasions, was awarded jail in one of such matters.

8. It was alleged that the applicant again falsely represented to the complainant that he had met with one Mr. Ashok Kumar Sagar and told him that he also needs money from the complainant. The applicant made the complainant meet Mr. Ashok Sagar and he agreed to pay them a total amount of ₹ 12 to 14 lacs as an extortion amount divided in monthly installments for over 2 years. This money was paid through his driver Lalit Rai at Harish Tiwari's office at D-28, Hauz Khan, New Delhi. It is further alleged that all the money was paid to Ashok Sagar through Harish Tiwari only.

9. The present FIR No. 495/2017 was thereafter registered on 16.09.2017 under Sections 384/389/34/120B of the IPC at police station Punjabi Bagh.

10. The applicant was arrested on 23.10.2017 and is stated to be in custody since then barring the number of days that he was released on interim bail. The charges were framed against the applicant on 31.05.2018 under Sections 384/389/411/120B of the IPC. The trial is stated to be pending before the learned Trial Court.

11. The applicant has admittedly spent more than three years in incarceration since the date of his arrest.

12. Learned senior counsel appearing for the applicant submits that



the bail applications filed on earlier occasions were dismissed by not only the learned Trial Court but by this Court on merits. The last bail application filed by the applicant was dismissed by order dated 13.10.2022 passed by the coordinate Bench of this Court in Bail Appl. 511/2022.

13. He submits that the order dated 13.10.2022 was challenged by the applicant by filing a Special Leave Petition before the Hon'ble Supreme Court, which was dismissed in *limine*. The Hon'ble Supreme Court had directed the learned Trial Court to conclude the trial within a period of six months from the date and in case of delay in the conclusion of the trial, the applicant was given the liberty to renew his application for bail before the Hon'ble High Court.

14. He submits that the applicant is confining his argument to the fact that he has already undergone the maximum prescribed sentence provided for the non-bailable offence he has been charged with.

15. He submits that despite the specific directions by the Hon'ble Supreme Court, the learned Trial Court has not been able to conclude the trial, and still more than 40 witnesses are left to be examined.

16. He submits that the maximum punishment for an offence committed under Section 384 of the IPC can extend to three years and the applicant has already undergone more than the said period.

17. He further submits that Section 389 of the IPC even though prescribes the punishment upto life but is a bailable offence.

18. It is vehemently argued that in terms of Section 436-A of the Cr.P.C., an under-trial cannot be detained for a period more than the maximum period of imprisonment provided for the offence.

19. He submits that the applicant has already undergone the



maximum period of imprisonment provided under Section 384 of the IPC and the offence under Section 389 being bailable, the applicant ought to be released on bail.

20. Learned APP for the State and the learned counsel for the complainant oppose the grant of bail to the applicant.

21. It is submitted that the same issue was agitated before this Court on an earlier occasion as well. This Court, after considering the arguments advanced, had rejected the application for bail filed by the applicant by its order dated 13.10.2022.

22. It is further submitted that the said issue was again agitated before the Hon'ble Apex Court. The Hon'ble Apex Court has also dismissed the SLP and therefore, the said issue cannot be agitated once again in the present bail application.

23. They further rely upon Section 436(2) of the Cr.P.C. to contend that where a person fails to comply with the conditions of the bail-bond, the Court may refuse the release of such person on bail.

24. They submit that the applicant, despite the direction to surrender after the expiry of interim bail, had defaulted in surrendering, which led to the issuance of NBWs against the applicant. The conduct of the applicant, while in jail as well as while on interim bail, has not been satisfactory. The applicant had threatened the key witnesses while on interim bail and even as per the nominal roll, the conduct of the petitioner is unsatisfactory.

25. It is, thus, contended that the applicant if released on bail, is likely to hamper and impede the trial and may also tamper with evidences and threaten the witnesses.

26. Learned Senior Counsel for the applicant, in rejoinder, submits



that pursuant to the interim bail, the applicant was to surrender before the learned Trial Court on 27.11.2021. The applicant, however, on the said date, on account of P/R GI-Bleeding was admitted in the Max Super Speciality Hospital, Saket. He relies upon the advice issued by Dr. Vivek Kumar, Max Hospital stating that the doctor had advised coronary angiography on a priority basis for life saving. He submits that due to the said reason, the applicant moved an application before the concerned Trial Court, seeking two days' time in order to make medical arrangements for the medication and medical equipment and also praying for directions to allow the applicant to surrender before the jail authorities and also sought directions to the jail superintendent to keep the applicant in medical ward under supervision.

27. He submits that the learned Trial Court, without seeking any verification of the medical documents, issued a non-bailable warrant on 27.11.2021 and the applicant was arrested by the Police from the hospital on 29.11.2021.

28. He, therefore, submits that the applicant, being admitted, could not have surrendered on 27.11.2021, hence, the same cannot be termed as any act in violation of the bail-bond. He further submits that no application has ever been filed by the State under Section 446A of the Cr.P.C., seeking cancellation of the bail bond.

29. He further submits that the allegation that the applicant, while on interim bail, had threatened the driver of the complainant, is also baseless. The same is evident from the fact that even though DD entry was made, no action till date has been taken by the State in that respect. He submits that frivolous allegations were made only to prejudice the Court.



Analysis

30. The provisions of bail with regard to the bailable offence are contained in Section 436 of the Cr.P.C. whereas the bail in relation to the under-trial, who is detained for a non-bailable offence is governed by Sections 437 and 439 of the Cr.P.C.

31. There is no quarrel that the person, who is accused of a bailable offence, is entitled to be released on bail pending his trial. The moment the accused is prepared to give bail, the Police Officer or the Court, as the case may be, is bound to release the accused on such terms as may appear to be reasonable.

32. The right to claim bail under Section 436 of the Cr.P.C. in relation to a bailable offence is held to be an absolute and indefeasible right. No discretion has been provided to the Officer or the concerned Court to refuse such bail except to impose reasonable terms and conditions. It is also equally well-settled that the accused released on bail forfeits his right if his conduct subsequent to his release is found to be prejudicial to a fair trial.

33. In terms of Section 436A of the Cr.P.C. no person can be detained for a period more than the maximum period of imprisonment provided for the offence he has been detained under.

34. It is an admitted position that the applicant, in the present case, has been charged under Sections 384/389 of the IPC. Section 384 being non-bailable and punishable with a maximum imprisonment of upto three years and Section 389, even though, punishable with imprisonment upto life, still is a bailable offence.

35. It is also an admitted position that the applicant has already undergone more than three years of incarceration and therefore in



terms of Section 436A of the Cr.P.C. cannot be detained further in respect of Section 384 of the IPC, having already undergone the maximum punishment provided.

36. The only issue, therefore that remains to be considered, is the grant of bail in relation to offence under Section 389 of the IPC. As noted above, the offence under Section 389 of the IPC is a bailable offence.

37. This Court, while dismissing the application for bail, has noted the argument advanced by the learned senior counsel that the applicant has already undergone more than three years of incarceration.

38. It is also pointed out that the said ground was also taken in the SLP filed by the Hon'ble Apex Court challenging the order dated 13.10.2022. The SLP, however, was dismissed in *limine*.

39. It is also a matter of fact that the Hon'ble Supreme Court, while dismissing the SLP, also gave liberty to the applicant to file a fresh bail application before this Court in case the trial extends beyond six months of the dismissal of the SLP.

40. It is an admitted position that the trial is yet to be completed despite the period of six months having elapsed. On being asked, it is informed that out of 70 witnesses, 42 witnesses are yet to be examined.

41. Therefore, it cannot be held that the applicant is not entitled to file a fresh application for bail, the said liberty having specifically been granted by the Hon'ble Supreme Court.

42. When such liberty is granted by the Hon'ble Supreme Court, no limitations can be imposed on a party, to raise any such ground which it feels would entitle it to an order on bail and are permissible in law.



It is well-settled that the dismissal of an SLP in *limine* simply implies that the Hon'ble Supreme Court did not consider the case to be worthy of examination. Such dismissal of an SLP in *limine* does not constitute any declaration of law or a binding precedent. It is true that an accused cannot be permitted to file repeated bail applications but it is also equally well-settled that the change in circumstances is a valid consideration for the Court to entertain a subsequent bail application and the principles of *res judicata* are not applicable. [Ref : ***State of Punjab v. Davinder Pal Singh Bhullar : (2011) 14 SCC 770***]

43. It is noticed that even though this Court, by order dated 13.10.2022, has dismissed the application for bail filed by the applicant, but had not given any finding in relation to the entitlement of the applicant to bail in relation to a bailable offence.

44. Learned Counsel for the complainant has relied upon the judgment passed by the High Court of Punjab and Haryana at Chandigarh in the case of ***Puneet Sharma v. State of Punjab (CR-M 1222-2013)***, to contend that in case the accused violates the conditions of bail bond then the bailable offence becomes non-bailable.

45. I do not agree with the said view. When the legislature has made an offence a bailable offence, the Court, in my opinion, has no power to declare the said offence as non-bailable *dehors* the provisions of the Cr.P.C. It is not in doubt that Section 436(2) of the Cr.P.C. provides that the Court may refuse to release the accused on bail, where he has failed to comply with the conditions of bail bond, however, the power to refuse bail does not *ipso facto* makes the offence non-bailable which has different connotations.

46. Learned Counsel also relies upon various other judgments in



support of the argument that the Court ought not to grant bail even in a bailable offence in case the accused is found to have violated the condition of bail on an earlier occasion. There is no cavil as far as the said proposition is concerned. The same, however, has to be seen on the facts of each case.

47. The respondents have argued that it is an admitted case that the applicant was required to surrender before the learned Trial Court on 27.11.2021 pursuant to the interim bail granted by the learned Trial Court. The applicant has produced the advice issued by the Max Hospital, Saket, which categorically states that the applicant was admitted on 27.11.2021 through emergency to the hospital for acute P/RGI-Bleeding and was advised Coronary Angiography on a priority basis for life-saving. It is not the case of the State that the said advice, on verification, was found to be not genuine. It is though argued that the said advice puts a time of 02:41 p.m. and the possibility of the same being procured, cannot be ruled out. This argument, in my opinion, does not hold any weight in the absence of any contrary verification being carried out by the State.

48. Max Hospital, Saket, is not a small flyby night hospital and the advice issued cannot be brushed aside in this manner. Therefore, when the applicant was admitted in the hospital, the surrender before the Court on the said date becomes an impossibility. The applicant had, admittedly, filed an application before the learned Trial Court seeking two extra days to surrender and also prayed for a direction to the Jail Superintendent to provide adequate medical facilities.

49. After having brought to the knowledge that the applicant was hospitalised, the learned Trial Court, in my opinion, was not correct in



issuing a non-bailable warrant without getting the same verified. The said aspect of not surrendering on the said date, therefore, cannot be construed as the situation contemplated under Section 436(2) of the Cr.P.C. in which Court may refuse to release the applicant on bail in a bailable offence. The applicant's inability to surrender on 27.11.2021, on account of being admitted in the hospital, in the absence of any verification pointing out otherwise, cannot be termed as a failure to comply with the conditions of the bail bond as regards the time and place of attendance.

50. The other aspect which has been vehemently contended on behalf of learned Counsel for the respondent is that the applicant, while on interim bail, had threatened the driver of the complainant. This, in my opinion, is not a ground of such nature that would disentitle the applicant from being released on bail in a bailable offence. This is for more than one reason. Firstly, even though the DD entry was made with regard to the said allegation in the year 2008, no action has been taken till date even though more than four years have elapsed. Secondly, the said driver / witness is stated to have already been examined way back in February, 2018.

51. The other important aspect which cannot be brushed aside is that, despite the period of more than five years having been elapsed, only 28 out of 70 witnesses have been examined. It is not a case of the State that the trial was delayed due to the dilatory tactics of the applicant. The Supreme Court, while dismissing the SLP against the order dated 13.10.2022, had categorically observed that the applicant would be entitled to revive his application for bail in case the trial does not get over within the period of six months from the date.



52. In view of the above, I am of the opinion that the applicant is entitled to be released on bail in terms of provisions of Section 436 read with Section 436A of the Cr.P.C. The applicant has been charged with Section 384 of the IPC which provides for the maximum punishment of imprisonment upto three years and the applicant has already undergone more than three years of incarceration. Thus, in relation to Section 384 of the IPC, the applicant is entitled to the benefit of Section 436A of the Cr.P.C. The other section, the applicant is charged with, is Section 389 of the IPC. The same is a bailable offence and in view of the facts and the law, as discussed above, the applicant is entitled to be released on bail.

53. Without commenting on the merits of the case, the applicant is directed to be released on bail on furnishing a bail bond for a sum of ₹2,00,000/- with two sureties of the like amount on the following conditions:

- a. The applicant shall upon his release provide his mobile number to the concerned IO / SHO and keep it switched on mode at all times;
- b. He shall appear before the learned trial Court on every date of hearing;
- c. He shall under no circumstance leave the city without informing the concerned IO / SHO;
- d. The applicant shall not leave the country without permission of the learned Trial Court
- e. He shall not contact any of the witnesses in any manner whatsoever.



54. The application stands allowed in the aforesaid terms.

AMIT MAHAJAN, J

JULY 14, 2023

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