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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S-2332-2023 (O&M)

Date of decision: 22.04.2024

Rafiq Khan

....Appellant

V/s

State of Haryana and another

....Respondents

CORAM: HON’BLE MR. JUSTICE SUMEET GOEL

Present: Mr. Shikhar Goel, Advocate for the appellant
(through Video Conferencing)
Ms. Priyanka Sadar, AAG Haryana.
Mr. Akshit Mehta, Advocate for respondent No.2-complainant.

SUMEET GOEL, J.

1. The present appeal is the third attempt by the appellant-Rafiq Khan for grant of bail in FIR No.165 dated 05.08.2021, registered for the offences punishable under Section 506 of IPC and Section 4 of POCSO Act and Section 3(2)(va) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 at Police Station Women NIT Faridabad.
2. The case set up in the FIR in question (as set out in the present petition by the appellant) is as follows:-

"12. To the SHO, Police Station Women, 21-A NIT, Faridabad. It is the submitted that I Rita W/o Munshi is resident of Gandhi Colony. My daughter Rinki is 14 years of age. On 05.08.2021, she informed me that one boy namely Rafiq had committed rape upon me on 04.08.2021 at about 05:30 pm. I have decided that my daughter be served with justice and that boy be punished, he has threatened my daughter that if she disclosed to anyone then he will kill her. Dated 05.08.2021. Sd/- Rita. ADDO-58 Gandhi Colony, NIT, Railway Road, Faridabad, Mob. No.9582836397."

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3. The appellant had earlier applied for grant of regular bail vide CRM-M-47883-2022 wherein the following order was passed on 08.12.2022:

“Petitioner is seeking regular bail in case bearing FIR No. 165 dated 05.08.2021 under Section 506 IPC, 4 of Protection of Children from Sexual Offences Act (Section 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act added later on) registered at Police Station Women, NIT Faridabad.

Custody certificate has been taken on record.

Learned counsel for the petitioner seeks to withdraw the present petition with liberty to avail remedy under Section 14A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

Dismissed as withdrawn with the liberty aforesaid.”

Thereafter, the appellant had filed an appeal bearing No. CRA-S-2738-2022 before this Court wherein the following order was passed on 05.01.2023:

“The appellant has assailed the order dated 16.09.2022 passed by the learned trial Court vide which his application for regular bail has been dismissed.

Notice of motion.

Mr. Surinder Kumar Dagar, DAG, Haryana, accepts notice on behalf of the respondent-State.

After arguing for some time, learned counsel for the appellant seeks to withdraw the present appeal at this stage.

Dismissed as withdrawn”

Thereafter, the present appeal i.e. the third appeal/petition for grant of regular bail has been preferred by the appellant on 10.08.2023.

4. Learned counsel for the appellant has argued that the appellant is in custody since 06.08.2021. Learned counsel has further argued that there is an inexplicable delay in lodging of the FIR. Learned counsel has further argued, by referring in extenso to the testimony of the victim recorded as a prosecution witness (PW-1), to submit that the entire testimony

case and hence the trial is not likely to culminate into conviction of the appellant. Learned counsel has further argued that the medical evidence does not support the case of the prosecution. It has been further argued that the trial is going at snail's pace and hence conclusion thereof will take long time. Thus, regular bail is prayed for.

5. Learned State counsel as also learned counsel for the complainant-respondent No.2 have vehemently opposed the grant of regular bail to the appellant on account of the present appeal being non-maintainable as it is the third appeal/petition for grant of regular bail as also on merits thereof. Learned counsels have further argued that the testimony of the victim as also her mother (when examined as a prosecution witness during the course of trial) completely supports the case of the prosecution. The allegations against the appellant are serious in nature. Thus, the learned State counsel as also the learned counsel for the complainant/respondent No.2 have prayed for dismissal of the instant appeal.

Prime Issue

6. The prime issue for consideration in the present appeal is as to whether the appellant deserves to be granted the concession of regular bail in the factual matrix of the instant case. The analogous legal issue, that arises for consideration is, as to whether a second/successive petition for regular bail is maintainable. The further analogous legal issue, that arises for consideration is, if a second/successive regular bail petition is maintainable, then what are the factors/parameters for consideration thereof.

Relevant Statutory provisions

7. Section 439 of the Code of Criminal Procedure, 1973 reads as under:-

- (1) *A High Court or Court of Session may direct –*
- (a) *that any person accused of an offence and in custody, be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;*
- (b) *that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :*

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

- (2) *A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.*

Section 362 of the Code of Criminal Procedure, 1973 reads as under:-

“362. Court not to alter judgment - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

Relevant Case Law

8. The precedents, *apropos* to the matter(s) in issue, are as follows:

- (i) In a judgment titled as ***Babu Singh and others vs. The State of U.P. 1978 AIR (Supreme Court) 527***, the Hon’ble Supreme Court has held as under:-

"2.But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsider

ration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.”

(ii) In a judgment titled as ***Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav, 2005(2) SCC 42***, the Hon’ble Supreme Court has held as under:-

“17.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.”

Analysis (re law)

9. The paramount issue, in any plea for grant of regular bail, is the liberty of an individual. Indubitably, within our society and jurisprudence, liberty is a cherished foundational principle and has fundamental ascendancy over all other attributes of social order. Even within the framework of Constitution, this principle is made conspicuous, *inter alia*, in Article 21 of our Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. The Cr.P.C., 1973 is one such procedural law which permits curtailment of liberty of anti-social and anti-national elements. Yet, liberty of an individual, the accused, must not transgress the rights of another individual, the victim, in terms of right to dignified everyday life without any imminent fear or threat. Additionally, the rights of the collective of individuals viz. the State/Society at large, also

cannot be neglected. Therefore, while countenancing the facts for

considering the bail, the rights of the triad of accused, victim and the State (Society at large) ought to be entailed. *Ergo*, while considering a bail plea, the Court ought to take into account this core concept(s).

9.1 An analytical perusal of Cr.P.C. explicates that this statute does not contain any provision relatable to maintainability or otherwise of second/successive bail petitions, including one(s) seeking regular bail. Once there is no statutory prohibition provided for in law, a Court is not logically empowered to import into it such prohibitions, especially in case of codified and legislated law. It is trite law that Courts ought not to read a provision in codified law which has not been specifically provided for by the legislature especially when such reading results into deprivation of rights. The bar contained in Section 362 of Cr.P.C. can, by no stretch of legal imagination, be said to be barring the filing of second/successive regular bail petition.

9.2 The Hon'ble Supreme Court in case of ***Babu Singh*** case (supra) has held that rejection of a bail petition does not, by itself, forbid a Court from considering another one, later in point of time. Similar is the ratio decidendi of the judgment of Hon'ble Supreme Court in ***Kalyan Chandra Sarkar*** (supra). *Ergo*, it can be safely inferred that the decision of a Court *qua* regular bail petition is essentially an interlocutory order and hence the postulation of *res judicata* does not apply to its realm.

9.3 The issue that next craves attention is as to what are the factors/parameters for consideration of second/successive regular bail petition(s).

9.4. The concordant legal position is that the essential pre-requisite for consideration of second/successive regular petition is the material/substantial change in circumstances and factors of alike nature.

Undoubtedly, the further period of incarceration suffered by the petitioner-

accused after rejection/withdrawal of first/earlier plea for bail, pace of trial, the witnesses turning hostile or not supporting prosecution case and changed medical condition(s) of accused would be pertinent factor(s). It goes without saying that these factors are only illustrative in nature and cannot by any means be said to be exhaustive.

9.5 No rigid or universal criterion can possibly be delineated to conclusively govern the exercise of judicial discretion, in determining, as to what would constitute as the above stated substantial change in circumstances. Factual flexibility, one additional or different fact, may cause a sea of difference. There is no gainsaying that each case has its own distinct and unique facts and, hence, exercise of such judicial power is best left to the judicial discretion of a Court, in accordance with the settled norms of our jurisprudence.

10. As an epilogue to the above discussion, the following principles emerge:

I Second/successive regular bail petition(s) filed is maintainable in law & hence such petition ought not to be rejected solely on the ground of maintainability thereof.

II. Such second/successive regular bail petition(s) is maintainable whether earlier petition was dismissed as withdrawn/dismissed as not pressed/dismissed for non-prosecution *or* earlier petition was dismissed on merits.

III For the second/successive regular bail petition(s) to succeed, the petitioner/applicant shall be essentially/pertinently required to show substantial change in circumstances and showing of a mere superficial or ostensible change would not suffice. The metaphoric expression of seeking second/successive bail plea(s) ought not be abstracted into literal iterations of petition(s) without substantial, effective and consequential change in circumstances.

IV No exhaustive guidelines can possibly be laid down as to what would constitute substantial change in circumstances as every case has its own unique facts/circumstance. Making such an attempt is nothing but an utopian endeavour. *Ergo*, this issue is best left to the judicial wisdom and discretion of the Court dealing with such second/successive regular bail petition(s).

V In case a Court chooses to grant second/successive regular bail petition(s), cogent and lucid reasons are pertinently required to be recorded for granting such plea despite such a plea being second/successive petition(s). In other words, the cause for a Court having successfully countenanced/entertained such second/successive petition(s) ought to be readily and clearly decipherable from the said order passed.

Analysis (re facts of the present case)

11. Now this Court reverts to the facts of the present case to ratiocinate thereupon.

12. The allegations made in the FIR against the appellant (herein) relate to committing sexual assault upon a scheduled caste victim. The appellant is in custody since 06.08.2021 & as per custody certificate dated 13.04.2024 filed by the State counsel, he has suffered incarceration for more than 02 years and 08 months. As per the said custody certificate, appellant is reflected to be involved in another FIR bearing No.79 dated 01.03.2018 registered at Police Station NIT, Faridabad, Haryana under Section 363, 366-A of IPC. However, during the course of arguments, it had transpired that appellant was acquitted by Additional Sessions Judge, Faridabad vide judgment dated 24.09.2019 in the said FIR. The rival contention of learned counsel for the parties; regarding the veracity/inconsistency(s) in the testimony of the victim cannot be looked into, in detail, at this stage; lest it may prejudice the trial. An affidavit dated 04.04.2024 was filed by the

investigating officer of the FIR in question, a perusal whereof reflects that there are total 20 prosecution witnesses cited. Out of the prosecution witnesses so cited, the private witnesses namely the victim and her mother have been examined as PW-1 and PW-2 respectively, whereas father of the prosecutrix has been given up by the Public Prosecutor as being unnecessary. It has been further averred in the affidavit that 05 official witnesses have also been examined & 12 official witnesses are the ones remaining to be examined. It is noticeable herein that it has been averred in this affidavit filed by the investigating officer that there was no threat perception to any witness.

13. The first plea by the appellant (herein) for grant of regular bail was dismissed as withdrawn on 08.12.2022, primarily on a technical ground viz. the said petition had been filed under Section 439 of Cr.P.C. whereas the accused (herein) ought to have availed remedy in terms of Section 14-A of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Therefore, the ineluctable conclusion regarding this aspect of the matter is that the said petition was withdrawn on a technical/procedural ground. The second plea for grant of regular bail, filed by way of an appeal, was dismissed as withdrawn on 05.01.2023. The appellant has undergone further incarceration of about 01 year and 03 months since withdrawal of his last plea for bail with the trial not seeming to culminate in near future. There is no gainsaying that the period of custody undergone by bail-applicant is a relevant factor to be considered along with the severity/nature of allegations, as also quantum of punishment which is likely to be entailed, in case conviction is recorded against such bail-applicant. Speedy trial is a right vested in an accused, especially one who is in custody. No argument has

indicates that delay in culmination of trial is attributable to appellant-accused. Nothing tangible has been brought forward to indicate the likelihood of the appellant absconding from the process of justice or interfering with the remaining prosecution evidence.

14. Keeping in view the entirety of facts and circumstances of the case, further detention of the appellant as an undertrial is not warranted in the facts and circumstances of the case.

15. In view of above, the present appeal is allowed. Appellant is ordered to be released on regular bail on his furnishing bail/surety bonds to the satisfaction of the Ld. concerned CJM/Duty Magistrate. However, in addition to conditions that may be imposed by the concerned CJM/Duty Magistrate, the appellant shall remain bound by the following conditions:-

- (i) The appellant shall not mis-use the liberty granted.
- (ii) The appellant shall not tamper with any evidence, oral or documentary, during the trial.
- (iii) The appellant shall not absent himself on any date before the trial.
- (iv) The appellant shall not commit any offence while on bail.
- (v) The appellant shall deposit his passport, if any, with the trial Court.
- (vi) The appellant shall give his cellphone number to the Investigating Officer/SHO of concerned Police Station and shall not change his cell-phone number without prior permission of the trial Court/Illaqa Magistrate.
- (vii) The appellant shall not in any manner try to delay the trial.

16. In case of breach of any of the aforesaid conditions and those which may be imposed by concerned CJM/Duty Magistrate as directed hereinabove or upon showing any other sufficient cause, the

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State/complainant shall be at liberty to move cancellation of bail of the appellant.

- 17. Ordered accordingly.
- 18. Nothing said hereinabove shall be construed as an expression of opinion on the merits of the case.
- 19. Since the main appeal has been decided, pending miscellaneous application, if any, shall also stands disposed off.

(SUMEET GOEL)
JUDGE

April 22, 2024
Ajay

Whether speaking/reasoned:	Yes
Whether reportable:	Yes