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HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on:01.10.2021
Pronounced on:06.10.2021

Bail App. No.92/2021

ISHFAQ AHMAD KHAN

...PETITIONER(S)

Through: Mr. Tawheed Ahmad, Advocate.

Vs.

UT of J&K

....RESPONDENT(S)

Through: Mr. Irfan Andleeb, Dy. AG vice
Ms. Asif Padroo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. Petitioner has filed the instant petition under Section 439 Cr. P. C seeking bail in FIR No.183/2021 for offences under Section 363, 376 511, 323 IPC and Sections 7/8 of POCSO Act registered with Police Station, Kulgam.

2. It is contended that a false and frivolous FIR has been registered against the petitioner and that he is not involved in any offence. It is further averred that the petitioner had approached the Court of learned Sessions Judge, Kulgam, for grant of bail but the learned Sessions Judge without appreciating the statement made by the

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prosecutrix during investigation of the case dismissed bail application of the petitioner by treating the role of the petitioner at par with that of co-accused. It has been urged that the petitioner has been put behind bars without there being any material on record to implicate him in the alleged occurrence. The petitioner has undertaken to abide by all conditions that may be imposed by this Court in case he is admitted to bail.

3. After issuance of notice of this bail application to the respondents, time was sought by learned AAG to file response but despite availing several opportunities no response has been filed on behalf of the respondents.

4. In compliance to the guidelines laid down by this Court in **Badri Nath v. Union Territory of J&K (Bail App No.139/2020)** decided on 11.12.2020), notice was issued to the victim through her father, who appeared in response to the said notice before the Court and submitted that they have no objection in case bail is granted to the petitioner.

5. I have heard learned counsel for the petitioner and learned AAG appearing for the respondents. I have also gone through the material on record.

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6. The facts emerging from the charge sheet filed against the petitioner and co-accused before the trial court, a copy whereof has been placed on record by the petitioner, are that on 29.07.2021, the complainant, the father of the victim, lodged a written report before Police Station, Kulgam alleging therein that his daughter has been kidnapped by the accused including the petitioner herein and that the accused had attempted to commit rape upon her. On the basis of said report, FIR No.183/2021 for offences under Section 363, 376 511, 323 IPC and Sections 7/8 of POCSO Act was registered by Police Station, Kulgam, and investigation of the case was set into motion, whereafter charge sheet came to be filed against the accused including the petitioner herein before the trial court.

7. As per contents of the charge sheet, on the fateful day at about 9.00AM, the victim girl left her house for her school. At about 12.30 PM, the victim, a minor girl, started to proceed back towards her home but on the gate of the school, accused confronted her and asked her to board a red coloured Swift vehicle which was resisted by the victim where-after she was forcibly made to sit in the vehicle and kidnapped from there. It is further alleged in the charge sheet that the accused tried to commit rape

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upon the victim, outraged her modesty and gave a beating to her resulting in injuries to her. The charge sheet goes on to allege that when the victim raised alarm, the accused left her on Bye-pass Road near Chawalgam. During investigation of the case, the victim was subjected to medical examination and her statement and that of her father were recorded before the Magistrate under Section 164 of Cr. P.C. After investigation of the case, offences under Section 363, 376 511, 323 IPC and Sections 7/8 of POCSO Act were found established against the accused persons including the petitioner herein.

8. It appears that the petitioner along with co-accused had moved the Court of first instance i.e., Principal Sessions Judge, Kulgam, for grant of bail. However, the application was dismissed by the learned Sessions Judge, in terms of order dated 26.08.2021 on the ground that gravity of offence alleged to have been committed by the accused/petitioner is serious and that if the petitioner is released on bail, it will have adverse impact on the society on large especially in the context of woman's education, her dignity and her empowerment.

9. The first contention that has been raised by the respondents is with regard to maintainability of the bail

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petition. It has been contended that successive bail applications are not maintainable and once the Court of first instance has rejected the bail petition of the petitioner, it is not open to him to file another application without any change in circumstances.

10. The law on this issue is very clear that if an earlier application was rejected by an inferior court, the superior court can always entertain the successive bail application. In this behalf, it will be profitable to quote the following observations of the Supreme Court in the case titled **Gurcharan Singh & Ors vs State (Delhi Administration), AIR 1978 SC 179:**

“It is significant to note that under Section 397, Cr.P.C of the new Code while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under sub-section (3) of that section that when an application under that section has been made by any person to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. Similar was the position under Section 435(4), Cr.P.C of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although, under Section 435(1) Cr.P.C of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent powers of revision, the High Court’s jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under Section 439(2), Cr.P.C to cancel bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The

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High Court has undoubtedly jurisdiction to entertain the application under Section 439(2), Cr.P.C for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail. There is, therefore, no force in the submission of Mr Mukherjee to the contrary.

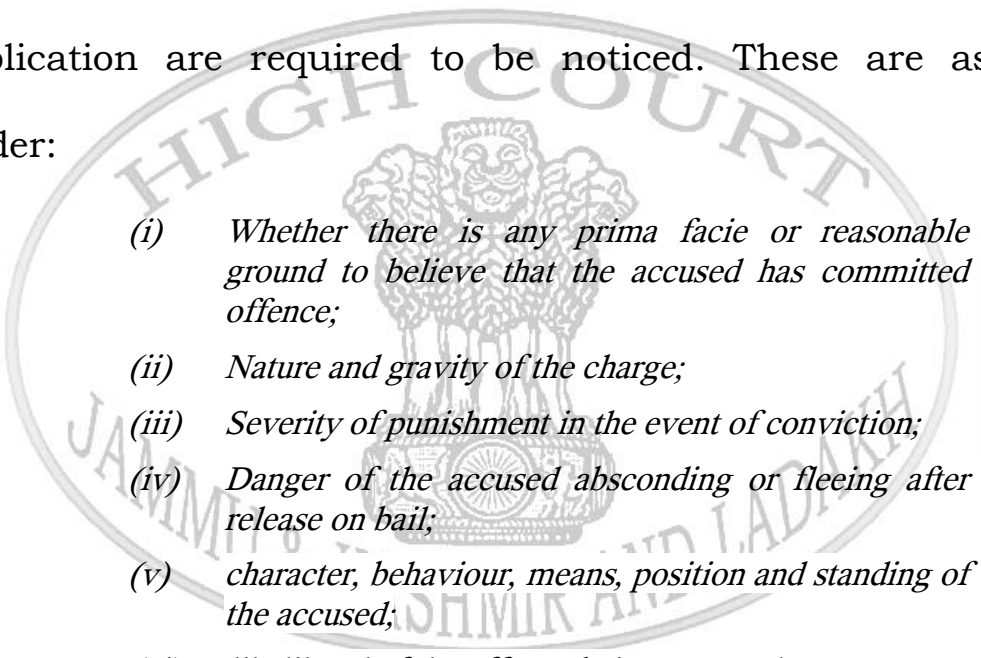
11. Relying upon the aforesaid observations of the Supreme Court, the High Court of Bombay in the case titled **Devi Das Raghu Nath Naik v. State, (Crimes Volume 3 1987 363)**, has observed as under:

“The above view of the learned Single Judge of the Kerala High Court appears to me to be correct. In fact, it is now well-settled that there is no bar whatsoever for a party to approach either the High Court or the Sessions Court with an application for an ordinary bail made under Section 439 Cr.P.C. The power given by Section 439 to the High Court or to the Sessions Court is an independent power and thus, when the High Court acts in the exercise of such power it does not exercise any revisional jurisdiction, but its original special jurisdiction to grant bail. This being so, it becomes obvious that although under section 439 Cr.P.C. concurrent jurisdiction is given to the High Court and Sessions Court, the fact, that the Sessions Court has refused a bail under Section 439 does not operate as a bar for the High Court entertaining a similar application under Section 439 on the same facts and for the same offence. However, if the choice was made by the party to move first the High Court and the High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Sessions Court is moved with a similar application on the same fact, the said application be dismissed. This can be inferred also from the decision of the Supreme Court in Gurcharan Singh's case (above).”

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12. From the aforesaid discussion of law on the subject, it is manifest that the rejection of a bail application by Sessions Court does not operate as a bar for the High Court in entertaining a similar application under Section 439 Cr. P. C on the same facts and for the same offence. The contention of the respondents in this behalf is, therefore, without any merit and the instant bail application is held to be maintainable.

13. Before coming to merits of this case, legal position about the matters to be considered for deciding a bail application are required to be noticed. These are as under:

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- (i) *Whether there is any prima facie or reasonable ground to believe that the accused has committed offence;*
 - (ii) *Nature and gravity of the charge;*
 - (iii) *Severity of punishment in the event of conviction;*
 - (iv) *Danger of the accused absconding or fleeing after release on bail;*
 - (v) *character, behaviour, means, position and standing of the accused;*
 - (vi) *likelihood of the offence being repeated;*
 - (vii) *reasonable apprehension of the witnesses being tampered with and*
 - (viii) *danger of justice being thwarted by grant of bail.*

14. When it comes to offences punishable under a special enactment, such as, POCSO Act, something more is required to be kept in mind in view of the special provisions contained in the said enactment. Section 31 of the said Act makes the provisions of the Code of Criminal

Procedure applicable to the proceedings before a Special Court and it provides that the provisions of the aforesaid Code including the provisions as to bail and bonds shall apply to the proceedings before a Special Court. It further provides that the Special Court shall be deemed to be a Court of Sessions. Thus, it is clear that the provisions of Cr. P. C including the provisions as to grant of bail are applicable to the proceedings in respect of offences under the POSCO Act. The present application is, therefore, required to be dealt with by this Court in accordance with the provisions contained in Section 439 Cr. P. C. The other provisions of the POCSO Act, which are also required to be kept in mind, are Sections 29 and 30, which read as under:

"29. Presumption as to certain offences - Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental stage but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this Section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely

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when its existence is established by a preponderance of probability”.

15. Section 29 quoted above raises a presumption of commission of an offence under Sections 3, 5, 7 and 9 of the POCSO Act against a person who is prosecuted for commission of the said offence, unless contrary is proved. Similarly, Section 30 quoted above raises a presumption with regard to existence of culpable mental state against an accused in prosecution of any offence under the Act which requires a culpable mental state on the part of the accused. Again, the accused in such a case has been given a right to prove the fact that he had no such mental state.

16. If we have a look on the material annexed to the charge sheet that has been laid before the Special Court against the accused, it transpires that during investigation of the case, statement of the victim as well as the statement of her father under Section 164 Cr. P. C has been recorded by the concerned Magistrate. The victim in her statement has clearly stated that it was co-accused, Shariq Safdar who made her to board the vehicle, gagged and kidnapped her from outside her school. She has further stated that it is the said accused only who gave a beating to her, tore her clothes and tried to molest her. The victim has not imputed any role to

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other accused i.e., the petitioner herein. The only reference by her to both the accused is that she spotted both the accused in a red coloured vehicle when she came out of her school whereafter she concealed herself behind a truck but accused Shariq Safdar chased her, caught hold of her by her hand, gagged her and put her into the vehicle. She has not attributed any role to the petitioner in these actions.

17. The father of the victim girl has also stated that he was told by his daughter that it was only accused Shariq Safdar who had kidnapped her and threatened to kill her in case she did not marry him.

18. In the face of the aforesaid material on record and without commenting upon merits of the case, lest it may prejudice the case of the prosecution, it appears that, prima facie, foundational facts that would give rise to the presumption under Section 29 of the POCSO Act against the petitioner, are not established in this case. Thus, prima facie, it appears that the presumption of guilt against the accused, in these circumstances, may not get triggered meaning thereby that there is no prima facie ground to believe that the petitioner has committed the alleged crime.

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19. The learned Special Judge while rejecting bail application of the petitioner has not taken trouble to even apply his mind to the statements made by the victim and her father under Section 164 Cr. P. C. The learned Special Judge has proceeded on the assumption that the victim has implicated both the accused in her statement and approached the cases of both the accused without actually appreciating the distinctive features of the roles played by the two accused. The material on record, as already discussed, clearly distinguishes the cases of the two accused. While the victim and her father have clearly implicated the co-accused but at the same time, they have stated nothing against the petitioner herein. This clear distinction between the cases of two accused has been missed by learned Special Judge while rejecting bail application of the petitioner. The learned Judge, it seems, instead of applying his judicial mind to the material on record has concentrated more on impact of the alleged crime on the women education. Before considering the impact of a crime on the society, a Court, while deciding a bail application, has to form a prima facie opinion as to the involvement of the applicant in the alleged crime by applying its mind to the material on record.

20. For the foregoing reasons, the application of the petitioner deserves to be accepted. Accordingly, the application is allowed and the petitioner is admitted to bail subject to the following conditions:

- I. That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the learned trial court;
- II. That he shall appear before the trial court on each and every date of hearing;
- III. That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;
- IV. That they shall not tamper with prosecution witnesses.

21. Observations made hereinabove shall remain confined to the decision of the instant application only and shall not be construed as an opinion on the merits of the case.

(Sanjay Dhar)
Judge

Srinagar,
06.10.2021
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No