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State of Kerala Vs. Vishnu

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Court : Kerala

Decided On : Dec-23-2005

Reported in : 2006(1)KLT445

Judge : K. Padmanabhan Nair, J.

Acts : Police Act - Sections 41; ;Indian Penal Code (IPC) - Sections 34 and 379; ;Criminal Practice Rules - Rules 30 to 36, Rules 37 to 46; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 2, 38, 438, 438(1), 438(3), 439(2) and 482; ;Code of Civil Procedure (CPC) - Order 3, Rule 4

Appeal No. : Crl. M.C. No. 560 of 2005

Appellant : State of Kerala

Respondent : Vishnu

Advocate for Def. : C.A. Chacko and; C.M. Charishma, Advs.

Advocate for Pet/Ap. : P. Deepthi, Public Prosecutor

Judgement :
ORDER

K. Padmanabhan Nair, J.

1. This is a proceedings initiated suo motu under Section 439(2) of the Code of Criminal Procedure for cancelling the pre-arrest bail granted to the respondent.

2. The facts necessary for the disposal of the case is as follows: The respondent Vishnu, S/o. Jayasree is the 2nd accused in Crime No. 221 of 2004 of Pazhayannur Police Station. 1st accused in that case is one Sulaiman, S/o. Saithumohammed. The accused, it is alleged, in furtherance of a common intention of committing theft of cement stored for the construction of a building of the defacto complainant Veerankutty, committed theft of one bag of cement from the construction site and placed the same in an autorickshaw. Before they could steal another packet of cement, the defacto complainant came to the spot. On seeing the defacto complainant, the accused abandoned not only the cement bag they had stolen, but also the autorickshaw and fled away from the scene of occurrence. Based on the F.I, Statement given by the defacto complainant, Crime No. 221 of 2004 of Pazhayannur Police Station under Section 379 read with Section 34 of Indian Penal Code was registered against the respondent and Sulaiman.

3. 1st accused Sulaiman filed B.A.5187 of 2004 before this Court under Section 438 of the Code of Criminal Procedure for the relief of pre-arrest bail on 7.9.2004. The case was posted to 13.9.2004 for instructions. On that day, the case was adjourned for production of Case Diary to 20.9.2004. On that day, a learned Single Judge of this Court dismissed that bail application holding that it was not necessary at that stage to permit the 1st accused to arm himself with any direction under Section 438 Cr.P.C.

4. The respondent (2nd accused) filed B.A.5479 of 2004 before this Court under Section 38 of the Code of Criminal Procedure for the relief of pre-arrest bail on 20.9.2004. The same was posted for instructions to 27.9.2004. A learned Single Judge of this Court dismissed the Bail Application on 27.9.2004 holding that for the proper investigation of the case, the petitioner (respondent herein) has to be interrogated and grant of anticipatory bail would hamper the smooth course of investigation. It was also observed that if the petitioner surrenders before the learned Magistrate having jurisdiction and applies for bail after giving sufficient

prior notice to the Prosecutor in charge of the case, the learned Magistrate must dispose of the application for bail on merits and expeditiously on the date of surrender itself, unless compelling and exceptional reasons were there.

5. On 24.11.2004, the 1st accused filed a second application for bail as B.A.6994 of 2004 before this Court for anticipatory bail with following averments.. After the dismissal of B.A.5187 of 2004 by this Court, the petitioner surrendered before the Judicial First Class Magistrate and sought for regular bail. But, the learned Magistrate was reluctant to pass any order as his name does not appear in F.I.R. or connected records. The 2nd accused, after the dismissal of his application by this Court, filed an application for pre-arrest bail before the Sessions Court as Crl.M.C.2099 of 2004 and the same was dismissed on 12.10.2004 (Actually Crl.M.C.2099 of 2004 was allowed). Subsequently, the petitioner filed Crl.M.C.2266 of 2004, but the same was dismissed by the learned Sessions Judge on 21.10.2004. Hence, the 2nd application for the relief of anticipatory bail.

6. When B.A.6994 of 2004 came up for hearing on2.12.2004, it was brought to the notice of this Court that the respondent herein (2nd accused) was granted anticipatory bail by the Sessions Court in Crl.M.C.2099 of 2004. This Court directed the registry to call for a report from the Sessions Court as to whether the respondent had disclosed the factum of dismissal of B.A.No. 5479 of 2004 by this Court in the Bail Application filed before the Sessions Court. The learned Sessions Judge forwarded a report stating that Crl.M.C.2099 of 2004 was filed by the respondent on 1.10.2004. Both sides were heard on 12.10.2004 and orders allowing the petition was passed on that day. It was further stated that the petitioner had not stated anything regarding his filing of B.A.No. 5479 of 2004 before this Court. It was further stated that neither the Advocate appearing for the petitioner nor the Public Prosecutor had brought to his notice the dismissal of B.A.5479 of 2004 by this Court. The learned Sessions Judge had stated that he was quite unaware of the fact that the petitioner had filed a Bail Application before the High Court and that it was dismissed when Crl.M.C.2099 of 2004 was considered and orders passed. A copy of the order passed in Crl.M.C.2099 of 2004 was also forwarded to this Court.

7. On 7.12.2004, the learned Single Judge after perusing the report passed an order stating that the respondent suppressing the fact that his application for anticipatory bail was dismissed by this Court had approached the Sessions Court and obtained an order of anticipatory bail. The learned Judge directed the counsel for the petitioner in B.A.6994 of 2004 and the Public Prosecutor to argue the matter about the fraud played by the respondent on this Court and also suppression of material facts for obtaining the order from the Sessions Court. When the matter came up for hearing on 4.12005, the counsel appearing for the petitioner in B.A.6994 of 2004 submitted that the Bail Application was not pressed. Hence that application was dismissed as not pressed.

8. On that day, this Court passed another order to take suo motu action under Section 439(2) of the Code of Criminal Procedure to cancel the bail granted to the 2nd accused (respondent herein). Accordingly, this Criminal Miscellaneous Case was suo motu registered and notices were issued to the respondent (2nd accused) and to the Public Prosecutor.

9. The Sub Inspector of Police, Pazhayannur filed a statement with the following averments: Crime No. 221 of 2004 of Pazhayannur Police Station was registered under Section 379 read with Section 34 of Indian Penal Code against A1 (Sulaiman) and A2 (Vishnu) who is the respondent in this case, alleging that they committed theft of a cement bag belonging to the defacto complainant (Veerankutty). The accused committed theft of one bag of cement and placed the same in an autorickshaw. At that point of time the defacto complainant came there unexpectedly. On seeing the defacto complainant, the accused ran away from the scene abandoning the stolen cement as well as the autorickshaw. It is stated that the respondent filed B.A.No. 5479 of 2004 and the same was rejected by this Court on 27.9.2004. Suppressing that fact, the respondent approached the Sessions Court by filing Crl.M.C.2099 of 2004 and on 12.10.2004 that application was allowed. It was averred as follows:

For this matter the respectable Public Prosecutor had asked for C.D. File and a report for objecting the anticipatory bail application from Investigating Officer of the above Crime 221/04.

On a perusal of CD-File, it is seen that on 4.10.2004 the Station House Officer, Pazhayannoor Police Station had submitted a report to respectable Public Prosecutor stating that the C.D. File is already submitted before the Hon'ble Advocate General Office in B A.5479/04-V3 and hence not able to submit the C.D. File before Public Prosecutor.

It is also averred that investigation of the case was over and on 5.1.2005, the Investigating Officer filed a charge-sheet against the two accused before the Judicial First Class Magistrate, Vadakkancherry and on a direction from the Public Prosecutor, a notice has been served on the 2nd accused (Vishnu) to show cause why the relief of anticipatory bail granted to him as per order dated 12.12.2004 in Crl.M.C.2990 of 2004 shall not be cancelled, but no further action was seen taken.

10. The respondent filed an affidavit raising the following contentions: He is arrayed as 2nd accused in the case alleging that he committed an offence punishable under Section 379 read with Section 34 of Indian Penal Code. He is innocent and he is made an accused only because of the fact that his mother happened to be the owner of the autorickshaw at the relevant time. He has further stated that because of the harassment by police, he had shifted his residence from his own house to his uncle's house. His uncle made arrangements for filing an anticipatory application before this Court without his knowledge and consent. He was unaware of the filing and dismissal of the B.A.5974 of 2004 before this Court. It is further averred that as the police again approached his mother, she filed another application before the Sessions Court, Thrissur and the same was allowed. The relevant portion of the affidavit reads as follows:-

In connection with the said crime as the police used to visit my house and threaten me and my mother, I shifted to my uncle's home. My uncle made arrangements for moving an application for anticipatory bail for me before this Hon'ble Court. But the said application i.e. B.A.No. 5479/ 2004 was dismissed by this Hon'ble Court on 27.9.2004. It is humbly submitted that neither my mother nor myself was aware of the said bail application as my uncle did not inform us regarding the same. As the police again approached my mother with threat of arrest, my mother made arrangements for moving an Application for anticipatory Bail on my behalf before

the Hon'ble Sessions Court, Thrissur and that application i.e. Crl.M.C.No. 2099/2004 was allowed on 12.10.2004.

I most humbly submit that I came to know of the dismissal of bail application filed before this Hon'ble Court recently only after getting anticipatory bail from the Hon'ble Sessions Court. I had no intention to suppress any facts from this Hon'ble Court and I did not submit application for anticipatory bail purposefully suppressing the dismissal by this Hon'ble Court.

(emphasis supplied)

He had also stated that for the last 13 years the whereabouts of his father is not known and he is only aged about 18 years and preparing for SSLC (Private) Examination and he was not involved in any criminal case. Hence, he prayed that the bail granted to him by the learned Sessions Judge may not be cancelled.

11. The point arising for consideration in this proceedings is whether the relief of pre-arrest bail granted to the petitioner is liable to be cancelled.

Point

12. For the proper disposal of this proceedings, I have called for and perused the records of B.A.5187 of 2004 and B.A.6994 of 2004 filed by the 1st accused Sulaiman, B. A.5479 of 2004 filed by the respondent (2nd accused) and the records of Crl.M.C.2099 of 2004 filed by the respondent before the Sessions Court. I have also perused the report filed by the learned Sessions Judge on 3.12.2004, the statement filed by the Sub Inspector of Police, Pazhayannur Police Station and also the reply affidavit filed by the respondent to the show cause notice issued to him.

13. As I already stated; the petitioner filed B.A.5479 of 2004 before this Court on 20.9.2004. No Vakalath was filed. A memo of appearance was filed. The operative portion of the memo of appearance reads as follows:--

We,... do hereby authorised and instructed by the Petitioner to file and conduct the above case before this Hon'ble Court, on behalf of him,.

(emphasis supplied)

14. A reading of the memo of appearance gives an impression that the bail application was filed as per the instructions of the respondent. But, the most material words regarding declaration and also the details regarding the person who instructed the pleader are conspicuously absent in the memo of appearance. In this connection, Rule 31 of the Criminal Rules of Practice is relevant. It reads as follows:--

31. Pleader to file memo appearance.-- Every Pleader as defined in Clause (9) of Section 2 of the Code, other than a public prosecutor, appearing either on behalf of the complainant or the accused shall file a memorandum of appearance containing a declaration that he has been duly instructed by, or on behalf of, the party whom he claims to represent.

Explanation.-- For the removal of doubt it is hereby clarified that Public Prosecutors and Assistant Public Prosecutors when they appear in Abkari cases and other complaints filed by any public servant under any law for the time being in force, need file only a memorandum of appearance containing a declaration that he has been duly instructed to appear in the case by such public servant or complainant, as the case may be.

15. Rule 31 of the Rules provides that the memo of appearance shall contain a declaration of the Pleader concerned as to who instructed him. The words 'declare that' are conspicuously absent in the memo of appearance. That omission does not appear to be an innocent or clerical mistake. B.A.5479 of 2004 was filed by the very same advocate who attested the reply affidavit sworn to by the respondent in this proceedings. There is no averment in the Bail Application also to the effect that the Bail Application was filed as per the instruction of the respondent himself. In paragraph 12 of B.A. 5479 of 2004 it was averred by the respondent that he had not filed any other Bail Application before any Court for the same relief and he will not be filing a similar application before any other Court during the pendency of that application. This Court considered the rival contentions and passed a considered order on 27.9.2004 dismissing that application. It is very pertinent to note that the 1st accused (Sulaiman) filed B.A.5187 of 2004 on 7.9.2004 and the

same was dismissed on 20.9.2004; the day on which the respondent filed his application for bail. After the dismissal of B.A.5479 of 2004 on 27.3.2004, another application was filed before the Sessions Court. Along with that bail application, the Advocate filed a memo of appearance. It contains a declaration to the effect that the pleader had been duly authorised by the petitioner (respondent herein) to appear and conduct the above case for and on behalf of the petitioner. A reading of the Bail Application as well as the declaration shows that that application for anticipatory bail was filed as per the instructions of the respondent himself and not by anybody else. But in the reply affidavit, it is specifically averred that that application was filed as per the instructions of his mother. So, according to the respondent he did not instruct the counsel who filed Crl.M.C.2099 of 2004 before the Sessions Court also to file the same. It is very pertinent to note that in that bail application there was no averment to the effect that the respondent had not filed a similar application before any other Court. There was no averment to the effect that he will not file a similar application before any other Court during the pendency of that application. That application was allowed by the learned Sessions Judge. The order reads as follows:--

Heard both sides. CD. perused. The petitioner is the 2nd accused in crime No. 221/04 of Pazhayannur Police Station under Section 379 of IPC. The allegation is that the petitioner along with other accused tried to steal cement bags from the defacto complainants shop. The petitioner is a student aged 18 years. According to the petitioner he is innocent. Considering the facts and circumstances of the case arrest and detention of the petitioner cannot be said necessary for the purpose of investigation. Hence this petition is allowed. It is hereby directed that in the event of arrest of the petitioner in connection with the above case he shall be released on bail on executing a bond for Rs. 5000/- with two sureties to the satisfaction of the officer effecting arrest. The petitioner is directed to appear before the investigating officer on or before 6.11.2004 for interrogation.

16. The statement filed by the Sub Inspector of Police in pursuance of the direction issued by this Court does not contain an averment to the effect that the CD. was made available to the learned Sessions Judge. On the other hand, it is specifically averred that on 4.10.2004 the Station House Officer, Pazhayannur Police Station

had submitted a report to the Public Prosecutor at Thrissur stating that the CD. file was already handed over to the Advocate General in connection with B.A.5479 of 2004 filed before this Court and hence he was not in a position to submit the same to the Public Prosecutor. There is nothing on record to show that the Investigating Officer got back the C.D. from the office of the Advocate General and produced before the Sessions Court. But the learned Sessions Judge in his order had stated that he had seen the C.D. Any way, I am not probing further into that matter.

17. In Crl.M.C.2039 of 2004 the respondent had not stated that an earlier application filed by him before this Court was dismissed. But, the Case Diary must contain copy of the report filed by the Investigating Officer to the Public Prosecutor of this Court in B.A.5479 of 2004. Had the learned Sessions Judge perused the Case Diary, he must have seen the report submitted by the Investigating Officer to the Advocate General.

18. The way in which the office of this Court dealt with B.A.5479 of 2004 is also far from satisfaction. The office did not verify the memorandum of appearance. The office failed to note that the memorandum of appearance does not contain the declaration by the Pleader as provided under Rule 31 of the Criminal Rules of Practice. Merely because a typewritten paper with a cause title 'memo of appearance' containing certain English words is filed, the same ought not have been accepted. Had the office verified and found out the vital omission and returned the application, the pleader would have stated whether he was authorised by the respondent himself or by somebody else.

19. Rules 30 to 36 of Chapter V of the Criminal Rules of Practice deals with appointment of Pleaders. Rule 31 provides that every pleader shall file a memo of appearance containing a declaration. Rule 32 deals with form and attestation of Vakkalath. Rule 33 provides that an Advocate will have to file special Vakkalath if he is appearing for the accused exempted from personal appearance. Rule 34 deals with change of pleader. Rule 35 provides that no pleader shall be entitled to take delivery of property or receive money or documents on behalf of his client unless he is specially authorised to do so by the Vakkalath or the power of attorney. Rule 36 provides that the appointment of a pleader will continue for

getting copies of judgments and other documents. There is no provision in the Code of Criminal Procedure corresponding to Rule 4 of Order III of the Code of Civil Procedure. Rule 31 enjoins that the pleader shall file a memo of appearance. It does not specifically state that the pleader may appear and plead for any person before a criminal Court without filing Vakkalath. But, in Joseph v. State of Kerala 1989 (1) KLT 574, this Court has held as follows:--

On filing a memorandum of appearance the pleader is entitled to appear and act on behalf of the accused in any criminal Court.

A pleader can appear and plead for a party before a criminal Court by filing a memo of appearance in accordance with Rule 31 of the Criminal Rules of Practice and need not file a Vakkalath.

20. As already stated, in this case the memorandum of appearance filed by the lawyer in B.A.5479 of 2004 does not contain any declaration as to whether he was instructed by the respondent himself or by anybody on behalf of him. The core question arising for consideration in this case is whether a lawyer can be allowed to file an application for anticipatory bail under Section 438 of the Code of Criminal Procedure and other proceedings before a criminal Court including this Court as per the instructions of a person other than the accused when he (the accused) is not under judicial custody and not under any legal disability to give proper instructions to his pleader.

21. The chance of one and the same accused instructing two pleaders to file applications for bail cannot be ruled out. Very recently, B.A.No. 6873 of 2005 was filed on 18.11.2005 under Section 438 of the Code of Criminal Procedure for the relief of pre-arrest bail for the accused in Crime No. 593 of 2005 of Chengannoor Police Station. The memorandum of appearance filed in the Bail Application reads as follows:--

I declare that I have been duly authorized to appear and defend the above proceedings for and on behalf of the petitioners.

On 24.11.2005, B.A.No. 7012 of 2005 was filed by another advocate for the same petitioners for the very same relief. The memo of appearance filed in that B.A. reads as follows:--

I declare that I have been duly authorised to appear and defend on behalf of the petitioners/ accused in this Bail application before this Hon'ble Court.

It is not discernible from the memorandum of appearance filed in both the cases as to who instructed the pleaders appearing in these two applications.

22. There is yet another aspect. This Court cannot ignore the fact that there are many criminal gangs exist in the State. The accused who is under custody may not be knowing as to who is the person who instructs a lawyer to file the bail application. The possibility of filing a bail application with the malafide intention of causing harm to the accused under custody after getting him released on bail also cannot be ruled out. Recently this Court had received a petition from FRP.No. 287 involved in Crime No. 80 of 2002 of Elathur Police Station in which the petitioner had raised an apprehension to the effect that in case she is released on bail, there is a possibility of some persons making an attempt to kill her. It is the duty of every criminal Court to make sure that applications and other proceedings for the accused are filed by proper persons only.

23. A pleader may file an application or other proceedings as per the instructions of the accused. But, that fact shall be clearly stated in the memo of appearance. The words which are not applicable shall be scored off. In such cases, the pleader will be personally responsible for the facts stated in the petition or proceedings unless the same is accompanied by the affidavit of the person under custody.

24. A pleader who files a petition or other proceedings before a criminal Court for and on behalf of a person who is under judicial or police custody as per the instruction of a person other than the person under custody shall file a memorandum of appearance containing a declaration to the effect that the same is filed as per the instructions given by any person for and on behalf of the accused. But, the person who instructs the pleader must be a person acquainted with the facts of the case and his name and address shall be stated in the memo of

appearance. He shall be a person who is authorised by the person under custody. The Court shall also insist for an affidavit sworn to by the person who instructs the pleader giving the details such as his connection with the accused whom he claims to represent. He should also state whether he had ascertained from the person under custody as to whether the accused had moved any other Court on earlier occasion for the same relief and also undertake that the accused will not move any other Court for the very same relief till the disposal of the application.

25. Now I shall consider the procedure to be followed by a person who is not under custody while filing an application or other proceedings in Court. In the normal course, the same shall be filed by that person himself, and the applicant himself give necessary instructions to the pleader. The application shall be accompanied by an affidavit sworn to by the petitioner giving necessary details.

26. A reading of the provisions of Section 438 of the Code of Criminal Procedure shows that an application for pre-arrest bail can be filed by the person apprehending arrest alone. The provisions of Section 438 Cr.P.C. reads as follows:--

438. Direction for grant of bail to person apprehending arrest.--

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) xx xx xx

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1).

A petition for a direction for grant of pre-arrest bail can be filed by a person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence. When such an application for pre-arrest bail is filed, the person who apprehends arrest is bound to disclose the grounds for his apprehension. Section 438(3) provides that if such a person to whom the relief of pre-arrest bail granted is subsequently arrested, he shall be released subject to the conditions. The person in whose favour such an order is passed has to execute a bond as ordered by the Court while granting that relief. When the law enjoins that a person who apprehends arrest alone is entitled to file an application, he himself has to instruct his pleader. Since the law mandates that a person apprehending the arrest will have to state the reasons for his apprehension, those statements must be in the form of an affidavit in accordance with Chapter VI of the Criminal Rules of Practice by that person himself. In that affidavit he must also state whether he had moved any other Court on an earlier occasion for the same relief. He must also state that during the pendency of the proceedings he will not approach any other Court for the same relief. If a number of persons file one petition, the same shall be accompanied by the affidavit of all the petitioners.

27.The same principle should be applied to the other proceedings, such as Miscellaneous Cases filed under Section 482 Cr.P.C. and petitions filed claiming custody of articles, etc. also If any petition under Section 482 Cr.P.C. is filed by a person under custody, the same can be filed by any lawyer as per the instructions given to him by a person other than the petitioner as stated above. If the applications are filed by a person who is not under custody, he must file an affidavit stating that the petition is filed as per his instructions. He must also state whether he had filed similar application before any other Court previously.

28. In Sundarbhai Ambalal Desai v. State of Gurajat : [2002]SUPP3SCR39 , the apex Court has issued directions to grant interim custody of valuables, vehicles, and other material objects involved in criminal cases during the pendency of cases. It is the duty of the Courts to make sure that valuables and vehicles are released to the proper person only. If currency notes, gold, etc. are released to the person based on a petition filed by the pleader alone, there is always a possibility that person who receive the same may deny the receipt of the same at a later

stage. So, in such cases the courts shall insist for a proper affidavit of the person claiming custody. The pleader shall also file a special Vakkalath as enjoined in Rule 35 of the Criminal Rules of Practice along with the petition claiming custody.

29. An accused who files an application claiming permanent exemption shall file a proper petition and the same shall be accompanied by an affidavit explaining reasons for claiming permanent exemption. Such petition shall be numbered only if the same is filed by an advocate along with a special Vakkalath as provided under Rule 33 of the Rules. It is to be noted that legal profession is not a commercial activity or is a trade or business. It is a noble profession. In Chairman, M.P. Electricity Board and Ors. v. Shiv Narayan and Anr. 2005 (4) KLT 485 (SC) : 2005 (5) Supreme 829 the Apex Court has held as follows:--

A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character.

Merely because a person approaches a pleader for filing a petition for another person, the pleader is not bound to oblige that person by filing an application. Had the pleader who filed the first Bail Application for the respondent insisted for the instruction from the respondent himself, this sorry state of affairs would not have arisen.

30. There may be cases in which a person who wants to file a petition or other proceeding before a criminal Court may not be able to instruct his pleader because of the legal disability or due to his physical condition. It may become necessary to file petition for and on behalf of a person who is minor, mentally ill or in deep coma. In such contingencies, the law permits a guardian or next friend to move the Court of law for and on behalf of such persons. In such cases, the person who represents the petitioner shall file a petition seeking leave of the Court. That application shall be accompanied by an affidavit explaining the circumstances under which the person who seeks relief is prevented from instructing the pleader. If the Court is satisfied with the genuineness of the claim, it may permit the next friend to prosecute the proceedings.

31. The learned counsel appearing for the accused/respondent has submitted that in many cases the police will not make available the Case Diary even after repeated directions and in such cases the Courts are compelled to dispose of the applications without perusing the Case Diary. I find it extremely difficult to accept this argument. If any Sessions Judge or Magistrate is disposing of any application for bail without ascertaining the stand of the Investigating Officer and without perusing the records, that practice is to be stopped. As early as on 9.11.1965, this Court had issued a Circular as Circular No. 18/65 directing all Magistrates that when an application for bail is made, intimation should be given to the Station House Officer and give him a reasonable, opportunity to make his representations to the Magistrate. The direction contained in the above stated Circular shall be followed by the Sessions Judges also. The Court shall insist for filing a statement by the Investigating Officer and the same shall form part of the records of the Bail Application. When a Bail Application is filed, notice shall be given to the Public Prosecutor and sufficient time is to be given to him to make available the Case Diary. If in any case the Public Prosecutor fails to make available the Case Diary for the perusal of the Judge, the Sessions Judge shall issue notice direct to the Investigating Officer to appear before that Court with the Case Diary. In case the police officer flouts such a lawful direction, action under Section 41 of the Police Act should be taken against the erring officer. If necessary, Sessions Judge can call for the records from the Magistrate.

32. In Circular No. 23/70 dated 2.7.1970 it was stated that an instance has come to the notice of this Court that a bail application was allowed by a Magistrate without taking note of the fact that a similar application was rejected earlier by the Sessions Court and also by this Court. It was ordered that in order to avoid such instances, copies of the orders rejecting the bail applications should also be communicated by the Sessions Court to the subordinate Court concerned and the High Court to the Sessions Court and the subordinate Court concerned. Had the orders passed in B.A.5187 of 2004 and 5479 of 2004 were promptly communicated to the Court of Session, even if that fact was wilfully suppressed either by the counsel for the petitioner or by the Public Prosecutor, that fact would have come to the notice of the learned Sessions Judge. So, the registry shall follow the directions contained in Circular No. 23/70 in its letter and spirit and

copies of the orders passed by this Court rejecting the Bail Applications shall be forwarded to the courts concerned forthwith.

33. In view of the factual controversy raised in this case and also in view of the fact that the investigation of the case was already over and the final report filed long back and also on account of the fact that the respondent is on bail from 12.10.2004 onwards, I am of the view that the relief of pre-arrest bail granted to the respondent need not be cancelled, though he obtained the same suppressing the material facts.

34. Though I am not cancelling the pre-arrest bail granted to the respondent, I am of the view that certain directions are to be issued to prevent such incidents in future. This Court and the criminal Courts shall follow the following matters while filing the criminal proceedings:

(i) Every pleader appearing for the accused or complainant shall file a memorandum of appearance containing a declaration specified in Rule 31 of the Criminal Rules of Practice. If the pleader is instructed by any person other than the accused, his name and address shall be stated in the memo itself. If the pleader is appearing for more than one accused/complainant, such details in respect of all accused/complainants shall be stated in the memo. If necessary, the pleader may file separate memo of appearance for each person. The words which are not necessary shall be scored off.

(ii) If proceedings is filed for and on behalf of person under custody and upon the instruction by a person who claims to represent the person under custody the application shall be accompanied by an affidavit. The deponent shall state that he has been authorised by the applicant/applicants to file the application or proceedings and the applicant/ applicants has/have not filed any similar petition for the same relief either before that Court or any other Court and the same is pending. He should also state that during the pendency of that application or proceedings no application for same relief shall be filed either before that Court or any other Court.

(iii) The Registry of this Court as well as the offices of the lower Courts shall at the time of filing of proceedings insist that every application or proceedings filed by a person who is not under custody shall be accompanied by an affidavit sworn to by that person himself. In case there are more than one applicant, each one of them shall file separate affidavits or a joint affidavit sworn to by all persons together in accordance with law.

(iv) The affidavit/affidavits filed shall be in proper form and attested as provided under Rules 37 to 46 of the Criminal Rules of Practice. The affidavit/affidavits shall contain an averment to the effect that the application is filed as per his/their own instructions.

(v) If the petitioner is under legal disability or prevented by sufficient cause, the person who instructs the pleader shall file an application for leave supported by an affidavit as stated in Clauses (iii) and (iv) above.

(vi) The Sessions Judges shall insist for the production of the Case Diary and verify the same before passing orders. The investigating officer shall be directed to file a statement in the proceedings and the same shall form part of the records.

(vii) This Court and Sessions Courts shall communicate copies of the orders to the lower Courts concerned forthwith.

(viii) The application for permanent exemption shall be accompanied by a special Vakkalath as provided under Rule 33 of the Criminal Rules of Practice and an affidavit/affidavits sworn to by the applicant/applicants claiming permanent exemption.

(ix) The application or proceedings filed claiming custody objects shall be accompanied by a special Vakkalath as provided under Rule 35 of the Criminal Rules of Practice and also an affidavit/affidavits of the person/persons claiming custody.

In the result, the Criminal Miscellaneous Case, registered suo motu, is closed with the above observations.

Office is directed to place a copy of this order to the Registrar (General) for necessary action and communicate the same to the Courts below.

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