

Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

SHAZAIB and others---Petitioners

Versus

The STATE---Respondent

Crl. P. No. 1075-L of 2020, decided on 29th July, 2021.

(Against the order dated 28.09.2020 passed by the Lahore High Court in Crl. Misc. No.39004-B of 2020).Court,

Criminal Procedure Code (V of 1898)---

---S. 498-A---Pre-arrest bail petition---Accused not present before the Court at the time of hearing of his pre-arrest bail petition---Effect---In case the petitioner-accused was not personally present in Court, the Court was not authorized to grant him (pre-arrest) bail and the petition was to be dismissed for his lack of presence in Court---However, in case some explanation was furnished for his non-appearance, the Court may, if it found that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period---Court could not, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case---Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250 not approved.

After the insertion of section 498-A of the Code of Criminal Procedure, 1898 ("Cr.P.C.") if the accused, seeking pre-arrest bail, was not present before the Court, the Court was not authorized to grant bail to such an accused and therefore, the (bail) petition was liable to be dismissed in the light of the said statutory provision.

Section 498-A, Cr.P.C. created a statutory fetter or a statutory precondition requiring the presence of the petitioner (accused) in person in Court for the exercise of jurisdiction by the court for granting pre-arrest bail. In case the petitioner was not personally present in Court, the Court was not authorized to grant him bail and the petition was to be dismissed for his lack of presence in Court. However, in case some explanation was furnished for his non-appearance, the Court may, if it found that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Court could not, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case. In fact the examination of the merits of the case in the absence of the accused totally defeated the intent and purpose of the section 498-A, Cr.P.C. This was because once the Court proceeded to examine the merits of the case, then the Court had the option to either dismiss or allow the bail petition, while under section 498-A, Cr.P.C. the Court was not authorized to admit the accused to bail in his absence.

Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250 not approved.

Umra Khan v. State PLD 1980 Pesh. 145; Shabbir Ahmad v. State PLD 1981 Lah. 599 (FB); Kalan Khan v. State 1982 PCr.LJ 149 and Zeeshan Kazmi v. State 1997 MLD 273 approved.

In case the petition was dismissed for non-appearance of the accused in a pre-arrest bail matter under section 498-A, Cr.P.C., the petitioner could file a fresh bail petition before the same Court provided that he furnished sufficient explanation for his non-appearance in the earlier bail petition and the Court was satisfied with his said explanation. But if he failed to furnish any satisfactory explanation, his second bail petition was liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail.

Mukhtar Ahmad v. State 2016 SCMR 2064 ref.

Ad interim bail granted in a pre-arrest application on the first hearing was to simply ensure that the petitioner was present on all the subsequent dates of hearing in the pre-arrest bail matter. Petitioner's presence was, therefore, required throughout the proceedings of the pre-arrest bail petition and the fact that he appeared on the first date when ad interim bail was granted did not in any manner lessen the rigours of

section 498-A, Cr.P.C. or absolve the responsibility of the accused from appearing in person before the court.

Syed Farhad Ali Shah, Advocate Supreme Court for Petitioner along with petitioners.

Humayoun Aslam, D.P.G. along with Muhammad Ashraf, S.I. for the State.

Raja Akhtar Nawaz, Advocate Supreme Court for Respondent No.2.

Date of hearing: 29th July, 2021.

ORDER

SYED MANSOOR ALI SHAH, J.---Petitioners seek leave to appeal against the order dated 28.09.2020 passed by the Lahore High Court in case FIR No.246 dated 25.04.2020 registered at Police Station Yousaf Wala, District Sahiwal for offences under sections 337-A(i)-F(i)(v)-L(2)-U(i), 148 and 149, P.P.C., whereby the pre-arrest bail petition of the petitioners has been dismissed for non-prosecution, as well as, on merits.

2. As the petitioners did not personally appear, in spite of the repeated calls, before the High Court, their bail petition before the High Court could not have proceeded further in terms of section 498-A, Cr.P.C. No reason has been given by the petitioners in the instant petition before us regarding their non-appearance before the High Court, and the petitioners have thus shown no legal defect in the impugned order, for dismissing their pre-arrest bail petition due to their non-appearance; this alone merits dismissal of the instant petition.

3. However, learned counsel for the petitioners submits that the petitioners have approached this Court because the High Court has also decided their petition on merits. In this backdrop, we deem it proper to underline the import of section 498-A, Cr.P.C. and explain how a pre-arrest petition is to be dealt with in case the accused-petitioner does not make himself present in Court at the time of hearing the petition.

4. After the insertion of section 498-A¹ of the Code of Criminal Procedure, 1898 ("Cr.P.C.") if the accused, seeking pre-arrest bail, is not present before the Court, the Court is not authorized to grant bail to such an accused and therefore, the petition is liable to be dismissed in the light of the said statutory provision. For convenience, section 498-A, Cr.P.C. is reproduced hereunder:-

"498-A. No bail to be granted to a person not in custody, in Court or against whom no case is registered, etc.: Nothing in section 497, or Section 498 shall be deemed to require or authorize a Court to release on bail, or to direct to be admitted to bail, any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or a direction that a person be admitted to bail, shall be effective only in respect of the case that so stands registered against him and is specified in the order or direction."

Section 498-A, Cr.P.C. creates a statutory fetter or a statutory precondition requiring the presence of the petitioner in person in Court for the exercise of jurisdiction by the court for granting pre-arrest bail. In case the petitioner (accused) is not personally present in Court, the Court is not authorized to grant him bail and the petition is to be dismissed for his lack of presence in Court. However, in case some explanation is furnished for his nonappearance, the Court may, if it finds that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Court cannot, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case. In fact the examination of the merits of the case in the absence of the accused totally defeats the intent and purpose of the aforementioned statutory provision. This is because once the Court proceeds to examine the merits of the case, then the Court has the option to either dismiss or allow the bail petition, while under section 498-A, Cr.P.C. the Court is not authorized to admit the accused to bail in his absence.

5. We are cognizant of the fact that before the addition of section 498-A in the Cr.P.C., the view of the High Courts was that once a petition for pre-arrest bail is admitted for hearing and notice is given to State, it has to be decided on merits notwithstanding the absence of the petitioner on the date fixed for hearing the petition.² However, after the addition of section 498-A in the Cr.P.C., there are divergent views of the High Courts, on this point: one set of judgments still retain to the said view,³ while the other set of cases hold the view that the petition for pre-arrest bail is to be dismissed if the petitioner is not present in Court

on the date fixed for hearing the petition and it is not to be decided on merits in his absence, unless the Court exempts his presence.⁴ We approve the judgments of the High Courts noted above, which have considered the change in the legal position after addition of section 498-A in the Cr.P.C. and disapprove those that still retain the earlier view as they have not taken account of the true import and meaning of section 498-A, Cr.P.C.

6. We have noted that the Lahore High Court, in *Tariq Hanif v. State*,⁵ has held that once a pre-arrest bail application is admitted and notice is given to the State it should be decided on merits even if the accused fails to put up appearance and has placed reliance on the judgment of this Court in *Muhammad Saleem Akhtar v. State*.⁶ for the said view. It is important to clarify that in the said judgment of this Court, it was not clear whether the Court was dealing with a matter involving pre-arrest or post-arrest bail; we, therefore called for the original file of that case. Perusal of the record available in the file, particularly the order of the High Court impugned therein, revealed that the petitioners before this Court had initially filed post arrest bail petitions in the High Court. During pendency of those petitions, the High Court admitted the petitioners to ad interim post arrest bail. Subsequently on a date fixed for hearing of those post arrest petitions the petitioners did not appear before the Court, and the High Court dismissed their post arrest bail petitions for non-prosecution. After that the petitioners filed pre arrest bail petitions in the High Court which the High Court dismissed with the observation that they failed to explain their absence in the previous post arrest bail petitions. It was in this context that this Court in *Muhammad Saleem Akhtar's* case observed:

"If the High Court considered it appropriate or necessary for the accused to be present on each and every date of hearing, it was required to have given them clear directions to remain present at the fixed dates. This is evident from the record that it was not done-by the Court. This may be the reason for the confusion which happened for the accused to appear or not to appear before the Court on the relevant date. We are, therefore, not satisfied with the reasons of the High Court to reject the bail applications of the petitioners for non-prosecution. In this view of the matter, bail application of the petitioners would be deemed to be still pending adjudication on merits."

The High Court had dismissed the post arrest bail petitions of the petitioners for non-prosecution and not their pre arrest bail petitions. The said observations of this Court related to the ad interim bail granted in the post arrest bail petitions and dismissal of those post arrest bail petitions for non-prosecution, and not the pre arrest bail petitions. This aspect has not been fully brought out in the recent judgment of *Tariq Hanif's* case⁷.

7. It is also clarified that in case the petition is dismissed for non-appearance of the accused in a pre-arrest bail matter under section 498-A, Cr.P.C., the petitioner can file a fresh bail petition before the same Court provided that he furnishes sufficient explanation for his non-appearance in the earlier bail petition and the Court is satisfied with his said explanation. But if he fails to furnish any satisfactory explanation, his second bail petition is liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail⁸. In the present case, the High Court could not have dismissed the petition on merits, in addition to dismissing the same for non-prosecution due to the personal absence of the petitioner under section 498-A, Cr.P.C.; therefore, the observations of the High Court regarding the merits of the case are not sustainable and hereby set aside. The petitioners are free to file a fresh bail petition, if so advised, before the High Court by giving explanation for their absence before the Court in their first bail petition and if the Court is satisfied with their explanation, it would decide their petition on merits.

8. It is also clarified that ad interim bail granted in a pre-arrest application on the first hearing is to simply ensure that the petitioner is present on all the subsequent dates of hearing in the pre-arrest bail matter. Petitioner's presence is, therefore, required throughout the proceedings of the pre-arrest bail petition and the fact that he appeared on the first date when ad interim bail was granted does not in any manner lessen the rigours of section 498-A, Cr.P.C. or absolve the responsibility of the accused from appearing in person before the court.

9. This petition is, therefore, converted into appeal and is partly allowed by setting aside the impugned order to the extent of observations on merits of the case, with the above observations.
MWA/S-41/SC Order accordingly.

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- [1](#) Inserted by the Code of Criminal Procedure (Amendment) Act (Act XIII of 1976), S.4 (w.e.f. 15.04.1976)
 - [2](#) See Fateh Muhammad v. State PLD 1973 Lah. 874 and Ahmad Raza Qasuri v. State 1974 PCr.LJ 482.
 - [3](#) See Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250.
 - [4](#) See Umra Khan v. State PLD 1980 Pesh. 145; Shabbir Ahmad v. State PLD 1981 Lah. 599 (FB); Kalan Khan v. State 1982 PCr.LJ 149 and Zeeshan Kazmi v. State 1997 MLD 273.
 - [5](#) Tariq Hanif v. State 2021 PCr.LJ 250
 - [6](#) Muhammad Saleem Akhtar v. State PLD 1996 SC 735
 - [7](#) Supra
 - [8](#) Mukhtar Ahmad v. State (2016 SCMR 2064)