

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. NO. 3922/2009**

Reserved on : 24.11.2009
Date of Decision : 16.12.2009

VINAY KUMAR & ANR.

.....Petitioners

Through: Mr.G.P.Singh, Advocate.

Versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr.Pawan Bahl, APP for
the State.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J.

1. The petitioner by virtue of the present petition has sought the following three reliefs:-

“(A) Setting aside the following part of the impugned order dated 7.11.2009 passed by the District Judge (West) Ms. Pratibha Rani in Bail Application No.(Nil) dated 29.10.2009 titled “Vinay Kumar and Anr. v. State”:

“If the present application is considered to be under Section 439 Cr.P.C., the case of the prosecution is that the promoters namely Vinay Kumar, Shabad Ansari, Sajid Jabbar and Anand Shanker adopted a very unique modus operandi for siphoning of the major amounts as commission from the alleged company M/s B.K.Jewellery House marketing Pvt. Ltd. And as per this strategy, the

initial approximately 1008 ID's were kept by the Directors, promoters, and their associated for themselves and thereupon the general public was made to join different schemes as revealed by the website developer and by adopting this modus operandi, the major profits, incentives etc were kept which had come on these ID's and that the Directors, promoters and their associates were well aware that the schemes were not feasible and successful but they continued to make promises to the victims for high yield and bonuses. The detailed report regarding the evidence available against the present applicants had also been mentioned in the report. In view of the gravity of the offence, the amount involved, the manner in which the offence was committed and the role attributed to the present applicants, I do not find it to be a fit case to enlarge the applicants, on bail. Prayer rejected."

(B) To mark the bail application no.4024/2009 to a Court other than the court presided over by Ms. Pratibha Rani, District Judge(West) for the reason that she has already expressed her aforesaid opinion on merits.

(C) Passing such further order(s) as this Hon'ble Court may deem fit and proper in the light of the facts and circumstances of the present case."

2. Briefly stated the facts of the case are that FIR No.62/2009 was registered u/s 420/406/120B IPC read with Section 4/5/6 of the Price Chit and Money Circulations Schemes (Banning) Act, 1978.

3. The allegation were that Chetan Malik and Rajesh Malik were the Directors originally of one M/s B.K.Jewellery House Marketing Ltd. and they had induced various investors to invest in number of schemes, giving an impression that these schemes were very lucrative. It was alleged that the petitioners invited the members of general public to deposit a sum of Rs.3,533/- or Rs.13,444/- as Silver distributor or Rs.68,216/- as Gold distributor and Rs.3,36,738/- as Platinum distributor which would get them very lucrative benefits.
4. During the course of investigation, it was found that apart from, Chetan Malik and Rajesh Malik as Directors of M/s B.K.Jewellery House Marketing Pvt. Ltd., there were other persons named as Vinay Kumar, Shabad Ansari, Anand Shanker and Sajid Jabbar who had also represented themselves as the promoters of the company for procuring the business for the accused company. It is alleged that after the arrest of Vinay Kumar and Shabad Ansari, an application under Section 439 of Cr.P.C. for grant of regular bail was filed before the learned Additional Sessions Judge Smt.Bimla Makin, learned District Judge (North West) which was heard on various dates and judgment was reserved.
5. On 17.9.2009, the present petitioners filed a separate bail application u/s 167 (2)(a) (ii) of Cr.P.C. for grant of

statutory bail in the Court of learned ACMM (West District) stating therein that as the charge sheet was not filed against the petitioners within sixty days from the date of their arrest and accordingly, the petitioners were entitled to the statutory bail. This bail application is alleged to have been dismissed by the learned ACMM on 21.10.2009 by observing that the period within which the charge sheet was to be filed qua the present petitioners was not 60 days but was 90 days.

6. Since the application for grant of statutory bail by the learned Magistrate was dismissed, the petitioners felt aggrieved and filed a petition for grant of the said benefit u/s 167 (2) (a) (ii) of the Cr.P.C. read with Section 439 of Cr.P.C. This application was considered by the learned District and Additional Sessions Judge Smt.Pratibha Rani (West) and it was rejected on 07.11.2009.
7. It is the case of the petitioner that although the order for grant of statutory bail was passed on 7.11.2009 however, the petitioner learnt about the said order for the first time and that too by inspection of the record on 13.11.2009.
8. In the meantime, the petitioner seems to have felt aggrieved on account of non-disposal of the regular bail application of the petitioner u/s 439 of the Cr.P.C. and accordingly he was allegedly constrained to file a petition u/s 482 of Cr.P.C. before the High Court for grant of bail or in the

alternative set aside the order of Sh.G.P.Mittal marking the application u/s 439 of Cr.P.C. which was transferred from the Court of Smt. Bimla Makin to the Court of learned ACMM (West) vide orders of the learned District Judge.

9. The petitioner feeling aggrieved by the said order passed by Sh.G.P.Mittal, learned Sessions Judge chose to file a criminal petition before the High Court on 03.11.2009 praying that the said bail application be either directed to be disposed of by Smt.Bimla Makin, learned Additional Sessions Judge as she had reserved the judgment or in the alternative mark the matter to any other Additional District Judge after setting aside the order of Sh.G.P.Mittal, learned District Judge or alternatively hear the bail application in the High Court itself and decide the same.
10. The said order of District Judge was set aside to the extent that instead of directing the ACMM (West) to decide the application u/s 439 of Cr.P.C. It was directed to be decided by the learned District Judge Smt.Pratibha Rani as it was an application filed u/s 439 of Cr.P.C. and only Sessions Court could deal with the same.
11. It has been contended by the learned counsel for the petitioner that the said application is still pending adjudication.
12. The petitioner has now chosen to file the present petition by raising the point that Smt.Pratibha Rani, Additional

Sessions Judge (West) has disqualified herself to consider the said application of the present petitioner u/s 439 of Cr.P.C. on account of the fact that the earlier bail application u/s 167 (2)(a)(ii) Cr.P.C. has not only been rejected by the said learned District and Sessions Judge on the ground that the application is not maintainable or that he cannot be granted the benefit of bail as there is no violation of Section 167 (2)(a)(ii) Cr.P.C. but it has also been rejected on merits and thereby, she has reflected her mind against the petitioner. It was urged that the decision on the bail application of the petitioner u/s 439 Cr.P.C. will become an empty formality. It was in this background that the learned counsel for the petitioner has contended that the regular bail application of the petitioner be heard by a Judge other than Smt.Pratiha Rani or allegedly the observations which have been passed by her on the merits of the case rejecting the bail application of the petitioner be set aside as the prayer of the petitioner was only for grant of bail on account of non-compliance of statutory provisions.

13. The learned APP has contested the plea of the present petitioner on the ground that admittedly the bail application of the petitioner u/s 167 (2)(a)(ii) Cr.P.C. was rejected on 7.11.2009 which happens to be a date before 10.11.2009 vide which order this Court on a petition filed

by the petitioner had directed the learned District Judge (West) to decide the application for grant of bail u/s 439 of Cr.P.C. of the petitioners as expeditiously as possible. It was the contention of the learned APP that in case the order on 07.11.2009 was passed which was within the knowledge of the present petitioner then it was his duty to bring this fact to the notice of the Court which would have been taken care of, while passing the order on 10.11.2009. Since this has not been done, the petitioner is contesting the present petition on the ground that no such direction for transfer of the case from District Judge (West) to any other Additional District Judge can be ordered by this Court. The learned APP has also filed the status report which supports his submissions.

14. I have considered the respective submissions of the learned counsel for the parties and gone through the authorities titled ***Nitin Nagpal Vs. State*** 2006(2) JCC 1138 **and** ***Ashwani Lochan Aggarwal Vs. State*** 2007(1) JCC 140 which have been cited by the learned counsel for the petitioner in support of his case.
15. There is no dispute about the fact that the present petitioners had filed an application for grant of regular bail under Section 439 Cr.P.C. much prior to the filing of an application for grant of what is called as a bail in default or statutory bail in terms of Section 167(2)(a) (ii) of the Cr.P.C.

on account of the non filing of the charge sheet within the period of 60 or 90 days from the date of arrest as envisaged in law.

16. In the instant case the petitioner admittedly filed an application for grant of bail in default on 17.09.2009 assuming that the charge sheet ought to have been filed by the investigating agency within a period of 60 days from the date of the arrest while as the learned District Judge (West) Ms.Pratibha Rani was of the view that since the case is alleged against the petitioner was such where the charge sheet ought to have been filed within 90 days and accordingly the bail application was dismissed.
17. Normally with the dismissal of the default bail application, the matter ought to have been brought to an end at that stage but it seems that the learned District Judge (West) in its anxiety to do justice to the matter exceeded its powers and ventured into an arena where she was neither expected nor requested to go. She went ahead to examine the case on its merits and observed that even if the application for grant of bail is considered on its merits, even then the gravity or the seriousness of allegations against the petitioners is such that they did not deserve to be enlarged on bail, without realizing the fact that neither there is any such ground for bail nor was any such point urged by the counsel. Moreover, the application for grant of bail of the

petitioner which stood transferred from the District Judge (West) still was pending. This portion of the order which was passed by the learned Judge on the merits of the case and which has been quoted in the prayer clause of the petitioner is unsustainable in the eyes of law and deserves to be accordingly deleted.

18. So far as the two judgments which have been referred to by the learned counsel for the petitioner are concerned, they do not help the petitioner in any manner. Both these judgments are pertaining to cases of bail in default while as the case of the petitioner is not a case of bail in default, rather it is case where certain observations are passed while disposing of default bail application which will have bearing and adverse effect on the regular bail application.
19. Now the question which arises for consideration is what happens to the regular bail application one of the main grievance of the petitioner in the first round had been that his application for regular bail has been heard and orders not passed because of change of jurisdiction the matter had been transferred to the present District where also the application could not be disposed of because of the aforesaid reason. Whatever, delay has occurred cannot be undone, but another aspect of the matter is that where the Apex Court has said that normally if a bail application has been dealt with by one particular Judge then all successive

applications at the same level must go to the same learned Judge to maintain continuity and consistency and above all to prevent forum shopping, but in view of the peculiar facts and circumstances of this case and in order to hold one of the dictums of 'rule of law' that justice must not only be done but seems to be done, is principle of law which forms the bed rock of the rule of law. Therefore, I am of the view that interest of justice in this case will be met in case the regular bail application of the petitioner which is still pending is dealt with by such learned Additional Sessions Judge of the District (West) to which the learned District Judge (West) Ms.Pratibha Rani marks the application. With these observations, the petition is allowed.

20. The expression of any opinion made hereinbefore may not be treated as an expression on the merits of the case and the orders in this case are passed in view of peculiar facts and circumstances may not be quoted as precedent.
21. Copy of this judgment be given Dasti to the learned counsel for the parties under the signatures of the Court Master.

V.K.SHALI, J.

DECEMBER 16, 2009
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