

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 38 OF 2015

Original Complainant. ... Applicant

Versus

1. Abhijit s/o Rajesh Kothari,
Age: 24 years, Occ: Advocate,
R/o. Munot Estate, Station Road,
Ahmednagar, Dist. Ahmednagar.
2. State of Maharashtra,
Through Kotwali Police Station,
Ahmednagar, Dist. Ahmednagar. ...Respondents

WITH

CRIMINAL APPLICATION NO. 37 OF 2015

Original Complainant. ... Applicant

Versus

1. Rajesh s/o Mohanlal Kothari,
Age: 60 years, Occ: Advocate,
2. Sau. Mangala Rajesh Kothari,
Age: 55 years, Occ: Advocate,
3. Renu Ajit Zarekar,
Age: 28 years, Occ: Advocate,
All R/o. Munot Estate, Station Road,
Ahmednagar, Dist. Ahmednagar.
4. State of Maharashtra,
Through Kotwali Police Station,
Ahmednagar, Dist. Ahmednagar. ...Respondents

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Mr. S.J. Salunke, Advocate h/f Mr. G.J. Pahilwan, Advocate for applicant

Mr. U.S. Malte, Advocate for respondent No.1 in Cri.M.A. No.38/2015 and for respondent Nos. 1 to 3 in Cri. M.A. No. 37/2015
Mrs. M.A. Deshpande, A.P.P. for respondent/State

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CORAM : N.W. SAMBRE, J.

DATE : 4th SEPTEMBER, 2015

ORAL ORDER :

Both these applications are moved by the complainant seeking cancellation of bail.

2. In the Criminal Application No. 38 of 2015, accused Abjijit was granted bail by learned District Judge-4 and Additional Sessions Judge, Ahmednagar, by an order dated 17/11/2015, whereas in Criminal Application No. 37 of 2015, regular bail was granted to respondent Nos. 1 to 3 pursuant to the order dated 30/10/2014.

3. All the accused persons-respondents herein are booked for committing an offence punishable under Sections 376, 504, 506 read with Section 34 of the Indian Penal Code.

4. It is an admitted fact on record that after completing the investigation in the present case, charge sheet is filed and the accused persons are admitted to regular bail. The case is committed to the Sessions Court.

5. Heard Mr. Salunke, learned Counsel for the applicant, Mr. Malte, learned Counsel for the accused persons and learned A.P.P. for the State.

6. The cancellation of bail is sought mainly on the ground of gravity of offence, the strong evidence that was brought on record, the seriousness of the case and *prima facie* involvement of the accused persons in the commission of crime. According to the applicant, the main accused Abhijit, who was granted pre-arrest bail was without considering the nature of evidence available against him. According to complainant, he has promised the present applicant of marriage and remained in physical relations since 2007 till the date of commission of offence. The accusation against the other respondents appears of aiding the main accused Abhijit and threatening the the present applicant for termination of pregnancy.

7. Mr. Salunke, learned Counsel would urge that the order of granting pre-arrest bail to accused Abhijit was based on the judgment/case laws, which has hardly any relevance to the facts of the case in question. According to him, by granting bail in serious case like the present one, the confidence of any common man has shattered as act attributed to the accused was serious. He would further urge that the result of D.N.A. test, points the finger to main

accused Abhijit being father of foetus. According to him, in view of conduct of accused, pregnancy was terminated upon permission from competent authority. He would further urge that in view of the fact that pre-arrest bail continues till the conclusion of bail, the applicant has made out the case for cancellation of bail.

8. So far as the Criminal Application No. 37 of 2015 is concerned, according to Mr. Salunke, learned Counsel for the applicant, having regard to the nature of evidence and seriousness of accusation, regular bail ought not to have been granted, as there is *prima facie* involvement of the accused in the crime in question.

9. So as to substantiate his contentions, learned Counsel for the applicant has relied upon the following cases laws of Apex Court and Bombay High Court.

- (1) State of U.P. vs. Naushad [2014 CRI.L.J. 540]
- (2) State of Maharashtra & anr vs Mohd. Sajid Husain
Mohd. S.Husain etc.[AIR 2008 SC 155]
- (3) Dinesh M.N. (S.P.) vs State of Gujrat
[(2008) 5 SCC 66]
- (4) Pokhar Ram vs. State of Rajasthan & ors
[(1985) 2 SCC 597]
- (5) Siddharam Satlingappa Mhetre vs State of Maharashtra

& ors [AIR 2011 SC 312]

- (6) Adri Dharan Das vs State of W.B.
[(2005) 4 SCC 303]
- (7) Prakash Kadam and etc. vs. Ramprasad Vishwanath
Gupta and anr. [2011 CRI.L.J.3585]
- (8) Vaijinath s/o Devappa Longaonkar vs State of
Maharashtra & ors [2011 ALL MR (Cri.) 1957]
(Bombay High Court)0

10. While countering the above referred submissions, Mr. Malte, learned Counsel for the accused would urge that the accused are already facing trial and there is no likelihood that they will run away from the process of justice. According to him, the accusations if are perused, *prima facie* demonstrate that the complainant remained in relationship with the main accused Abhijit, both being major since 2007 till 2014 i.e. almost for seven years. He would further urge that this is a fit case wherein this Court can infer the consent theory and as such, the accusation for the offence punishable under Section 376 of the Indian Penal Code *prima facie* is not attracted. He would further urge that so far as cancellation of regular bail is concerned, perusal of the accusations reflects that the accused persons in the said case has hardly played any role in the commission of offence in question. According to him, no fruitful

purpose will be served if the bail of the accused persons is cancelled.

11. By relying upon the law laid down by the Apex Court in the case of ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and others*** reported in ***AIR 2011 SC 312***, learned Counsel for the accused persons would urge that custodial interrogation of the present respondents-accused persons will be of no help to the prosecution. According to him, the applications are liable to be rejected. According to him, the learned Court below has exercised the discretion in most reasonable manner.

12. Learned A.P.P. while submitting the jurisdiction of the Court would urge that in the facts and circumstances of the present case, the Court may pass appropriate order.

13. Learned Counsel for the applicant, relying upon the judgment of the Apex Court in the matter of State of U.P. vs. Naushad, cited supra, has sought to canvass the theory of conditional consent and has sought to draw the support from paragraphs-10 and 11 thereof so as to canvass that the consent in the present case was conditional consent and was not voluntarily consent. The judgment of the Apex Court in the matter of State of Maharashtra vs. Mohd. Sajid Husain, cited supra, is relied upon by learned Counsel for the applicant so as to canvass that the factors

which are relevant for grant of pre-arrest bail i.e. nature and gravity or seriousness of accusation, antecedents of the accused persons, object of accusation to humiliate the reputation and fleeing from the justice are required to be adhere to. The judgment of the Apex Court in the matter of Dinesh M.N. vs. State of Gujrath, cited supra, is relied upon so as to canvass that irrelevant material was taken for the purpose of grant of bail and as such, grant of bail was not justified.

14. He has also relied upon the judgment of the Apex Court in the matter Pokhar Ram vs. State of Rajasthan, cited supra, particularly paragraph-13 so as to canvass that no compelling circumstances were established before the Court for grant of bail and faith of public in the administration of justice is shaken. He has also relied upon the judgment of the Apex Court in the matter Siddharam Satlingappa Mhetre vs. State of Maharashtra, cited supra, so as to canvass that the Court must carefully and meticulously evaluate the facts and investigation brought to its notice before dealing with the issue for grant of bail and as such, draw the support from paragraphs-96, 122 and 123 thereof. He has also relied upon the judgment of the Apex Court in the matter of Adri Dharan Das vs. State of W.B. cited supra, so as to submit that the arrest being part of investigation, same is with intention to secure several purposes, according to him, custodial interrogation was very much of the

accused Abhijit and there is strong case for curtailing freedom.

15. He has also relied upon the judgment of the Apex Court in the case of Prakash Kadam vs. Ramprasad Vishwanath Gupta, cited supra, particularly paragraphs-16 to 18 so as to submit that seriousness of allegations against the accused is of primary consideration and on that count, the bail can be cancelled.

16. No doubt, learned Counsel for the applicant, while trying to make out the case, has enlightened this Court in the matter of cancellation of bail, however, this Court is also required to be alive to the observations made by the Apex Court in the matter of Siddharam Satlingappa Mhetre, cited supra. Paragraphs-110, 111, 112, 117 and 119 thereof are required to be taken into account, which reads thus:

“ 110. In pursuance to the order of the Court of Session or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

111. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for

anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in Sibbia's case (supra).

112. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of section 438 Cr.P.C. It is also contrary to Article 21 of the 57 Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

117. The view expressed by this Court in all the above

referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character, this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant."

17. It is required to be noted that from the prosecution side, there is no case or complaint that the accused persons are not co-operating in the trial in question.

18. This Court or the Court below is alive to the fact as regards the contents of the F.I.R. and other investigation papers which reflects voluntarily statement of the applicant that she was voluntarily in relationship with the accused Abhijit since 2007 and had been to other places with him and kept physical relationship.

19. The fact that relationship exist from 2007 till 2014, *prima facie* inferred Court below, so also this Court to form opinion that *prima facie* appears to be consent from the complainant which of course with subject to judicial scrutiny during the trial based on oral evidence that is brought on record.

20. This Court, while keeping in mind the principles laid down by the Apex Court in the matter of Siddharam Satlingappa

Mhetre, cited supra, particularly as regards curtailing liberty of an individual and the considerations for grant of bail, is of the opinion that no case for cancellation of bail in the present case is made out. The applications, as such, fail, same stand dismissed.

[N.W. SAMBRE, J.]