

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 350 OF 2015
IN
CRIMINAL BAIL APPLICATION NO. 165 OF 2011

Narcotics Control Bureau

... Applicant

Vs.

1. Faiyazz Ahmed Rasool Shaikh

2. State of Maharashtra

... Respondents

Ms. Rebecca Gonsalves, Advocate for the applicant.

Mr. Anil Lalla i/b. Lalla & Lalla, Advocate for the respondents.

CORAM	:	MRS.MRIDULA BHATKAR, J.
RESERVED ON	:	AUGUST 4, 2015
PRONOUNCED ON	:	AUGUST 14, 2015

ORDER:

This Application for cancellation of bail is moved by Narcotics Control Bureau. Respondent/accused Faiyazz Ahmed Rasool Shaikh was arrested in NCB/BZU/CR-11/10 and in NDPS Special Case No. 01 of 2010 pending before Additional Sessions Judge, Raigad, Mangaon for the offences punishable under section 9-A r/w. section 25(A) and section 25 and 29 of NDPS Act of 1985, as he was involved in purchase of 93 kg. Of Ephedrine, a controlled substance. In the said case, the accused was granted bail by this Court by its order dated 5th May, 2011 and when he was on bail, in July 2014 NCB Hyderabad again arrested him for his alleged dealings in 154 kg. Ephedrine and thereby offence was registered against him with NCB. The accused was granted bail by the Andhra Pradesh High Court. NCB thereafter moved an application before this

Court under section 439 of Cr. P.C. for cancellation of bail granted by this Court on the ground that the accused indulged into similar offence.

2. The learned counsel Ms. Rebecca submitted that in the NDPS case before Raigad Court, the police seized 93 kgs. of Ephedrine manufactured by co-accused Santosh and Amit in their factory, which was to be supplied to the respondent/accused. In Hyderabad also, the accused was arrested for the purchase of 154 kgs. Ephedrine. The learned counsel submitted that it was expected that the accused should not have committed any offence when he is on bail, however, he has committed same offence and so his bail is to be cancelled. In support of her submissions, she relied on the following judgments of the Hon'ble Supreme Court:

- (i) **Subhendu Mishra vs. Subrat Kumar Mishra**, reported in AIR 1999 SC 3026 wherein the observations made in the case of **Dolat Ram vs. State of Haryana**, (1995) 1 SCC 349 were reproduced.
- (ii) **Mehboob Dawood Shaikh vs. State of Maharashtra**, reported in (2004) 2 SCC 362 wherein the grounds for cancellation of bail under section 439(2) which were laid down in **Raghubir Singh vs. State of Bihar**, reported in (1986) 4 SCC 481 were reproduced.
- (iii) **Ramesh Kumar Singh vs. Jhabbar Singh & Ors.**, reported in (2003) 10 SCC 195.

- (iv) **Union of India vs. Ramesh Kumar Chandmal Jain & Anr.**, in Criminal Application No. 584 of 2010 in Criminal Appeal No. 447 of 2008 dated 1st July, 2013.

While meeting the affidavit-in-reply filed by the accused, the learned counsel submitted that the time taken by the accused that CA report of drug which was seized from the factory is not Ephedrine is incorrect submission. She relied on the letter sent by Dinesh A. Chavan, Superintendent, NCB, Hyderabad on 5th March, 2015 wherein he has informed that the report confirms the samples are of Ephedrine.

3. The learned counsel Mr. Lalla for the respondent submitted that the respondent/accused is falsely implicated in this case. He is already released on bail. His bail cannot be cancelled and his liberty cannot be taken away. The learned counsel submitted that in Raigad case and in present case, the accused was not in possession of Ephedrine. In the case at Raigad, the accused was implicated on the basis of the statement made by the co-accused who were manufacturing Ephedrine. In the case at Hyderabad, the accused was not arrested in the factory but he was arrested at Hyderabad Airport on 6th July, 2014. The learned counsel submitted that as per the case of the prosecution, panchanama was drawn on 7th July, 2014, however, the accused was produced for the first time before the learned Magistrate on 10th July, 2014. The respondent/accused has a strong case of illegal detention. As per the case of the prosecution,

the respondent has produced Jet Airways ticket and he was arrested at the Airport. The learned counsel relied on the CCTV footage at the Airport. Further, the learned counsel relied on CA report dated 31st December, 2014 where it was mentioned that Exhibit C1 did not give positive tests of the presence of Ephedrine. He submitted that the accused has a good case on merit before this Court and also before Hyderabad High Court. He further submitted that the respondent/accused has not tampered the evidence or pressurized any witnesses. He has also not tried to jump the bail. In support of his submissions, he relied on the following decisions of the Hon'ble Supreme Court:

- (i) **Bhagirathsinh Judeja vs. State of Gujarat**, reported in 1984 Cri. L.J. 160.
- (ii) **Delhi Admn. vs. Sanjay Gandhi**, reported in 1978 Cri. L.J. 952.

4. By way of rejoinder, the learned counsel Ms. Rebecca pointed out that the CA report in Hyderabad's case shows that ephedrine was found in 5 samples, which were taken out from the bags, when the respondent/accused was uploading those bags in the truck. She further submitted that one more offence is also registered under NDPS Act against the respondent at Bharuch in Gujarat on 26th October, 2012 where he was found with ephedrine. She submitted that when the applicant was in custody in Bharuch case, he ran away and thereafter he was arrested.

She submitted that considering the antecedent of this respondent, the bail granted is to be cancelled.

5. In reply, the learned counsel for the respondent submitted that Bharuch's case cannot be said as a separate case, as on 26th October, 2012 simultaneously the raids were carried out at Mangaon and also in Bharuch and the applicant/accused was shown in both the cases but he was not present at Mangaon, which is before this Court wherein he is granted bail. Therefore, the case of Bharuch cannot be said as another offence. He further submitted that ephedrine itself in raw form is prohibited but it is along with other drug i.e. Benzedrine is not a controlled substance.

6. It is a case for cancellation of bail. The said power is to be used sparingly. The ground for cancellation of bail is abuse of liberty given, as the similar offence is committed by the accused. Before going into the merits of the case, the law discussed on this issue as pointed out by the cases cited by the learned counsel for the both the sides is to be mentioned-

In the case of **Subhendu Mishra vs. Subrat Kumar Mishra** (*supra*), the order of the High Court for cancellation of bail was set aside by the Hon'ble Supreme Court. However, while drawing a distinction between the factors relevant for rejection of bail and factors relevant for cancelling bail, it is discussed that these two are distinct things. If there is

abuse of concession granted to the accused in any manner, then the bail can be cancelled .

7. In **Raghubir Singh** (*supra*) 5 grounds are made. If at all there is interference in the course of investigation; if an accused attempts to tamper evidence or witnesses; threatens witnesses; indulges in similar activities; or tries to jump the bail and makes himself unavailable to the agency, then the bail can be cancelled. These grounds are illustrative and not exhaustive.

8. In **Union of India vs. Ramesh Kumar Chandmal Jain** (*supra*) the respondent no. 1 was convicted and when he was on bail after conviction, he committed offence and so his bail was cancelled.

9. In the case of **Bhagirathsinh Judeja** (*supra*), the issue of cancellation of bail was before the Hon'ble Supreme Court and the Hon'ble Apex Court has held that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. If there is no prima facie case, then there is no question of considering other circumstances and even if prima facie case is established, the approach of the Court in the matter is bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence.

10. In the case of **Delhi Admn. vs. Sanjay Gandhi** (*supra*), an application was moved by Delhi Administration in the year 1978 in respect of cancellation of respondent's bail, who was charged with the offence under section 409 of the Indian Penal Code. The Hon'ble Supreme Court has observed that the power to take back the accused in custody who has been enlarged with care and circumspection. In that case, the Supreme Court has relied on the case of **Gurcharan Singh vs. State (Delhi Administration)**, 1978 Cri. L.J. 129. While confirming the order of the High Court cancelling the bail of accused, the Hon'ble Supreme Court observed in **Gurcharan Singh's** case that the only question which the Court had to consider at that stage was whether "there was prima facie case made out, as alleged, on the statement of the witnesses and on other materials that there was likelihood of the accused tampering with the prosecution witnesses.

11. In the present case, the respondent/accused was arrested in Raigad case, as Ephedrine was manufactured to supply. In Hyderabad case also Ephedrine was seized. The report of CA in both the cases is positive. The accused was not found in actual physical possession of the Ephedrine. Ephedrine is a controlled substance and it is not covered under the rigor of section 37 of NDPS Act. In the case before Raigad Court, the accused was granted bail on merit and in the case at Hyderabad also, the learned Judge of the High Court has considered the case of the accused on merit

and has granted him bail. The data of antecedents of the accused must be placed by NCB before the Andhra Pradesh High Court while deciding Application for bail in Hyderabad case. Admittedly there is no instance of applicant/accused not attending the trial or jumping the bail. There are no allegations of tampering of evidence or witnesses. The respondent is involved in three cases at Mumbai, Bharuch and Hyderabad for the purchase of ephedrine, however, the case at Mangaon and Bharuch are registered in the raids which are simultaneously conducted. As submitted by the learned counsel Ms. Rebecca, in Bharuch case, even though the respondent has tried to run away when he was in custody, he was granted bail. Admittedly, in the second case, bail is granted on merit. It is a settled position that parameters for refusing bail and of cancellation of bail are different. The applicant/accused is already set free and considering the bail orders passed by the two High Courts and the facts herein, I am not inclined to curtail the liberty of applicant/accused. Therefore, I am of the view that the bail granted by this Court cannot be cancelled. Hence, the Application is dismissed.

(MRS.MRIDULA BHATKAR, J.)