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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1265 OF 2014

Mr. Bashir Yasin Shaikh

..Applicant

Vs.

State of Maharashtra & Anr.

..Respondents

Mr. Prashant Pandey for Applicant.

Ms. Sharmila Kaushik, APP for Respondent No.1-State.

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CORAM: A.S. GADKARI, J.

DATE : 23rd January 2015.

P.C.

1 The Applicant, original accused in C.R. No.49 of 2014 registered at Sewree Police Station, Mumbai under Section 420 and 506 of the Indian Penal Code dated 17th April 2014 has questioned the correctness of the order dated 25th November 2014 passed by the Special Judge/Sessions Court in Misc. Application No.2075 of 2014 in Bail Application No.1385 of 2014 thereby directing the Applicant to remain present on the next date without fail.

2 The record discloses that on 17th April 2014, the complaint Mrs. Mehrunnissa Hussein lodged a complaint with the Sewree Police Station under Sections 420 and 506 of the Indian Penal Code. The said FIR

came to be registered as C.R. No.49 of 2014 of the even date. The Applicant was arrested on 10th May 2014. The Applicant subsequently filed a Bail Application No.1385 of 2014 in the Court of Special Judge of Greater Mumbai. The learned Special Judge by its order dated 30th May 2014 was pleased to release the Applicant on bail on certain conditions.

3 It further appears that as the Applicant did not honour his commitment as has been mentioned in paragraph-10 of the order dated 30th May 2014 passed by the learned Special Judge in Bail Application No.1385 of 2014 and also failed to adhere to the conditions imposed by the said Court, the Complainant i.e. Mrs. Mehrunissa Husseini filed an Application for cancellation of bail by filing Misc. Application No.2075 of 2014.

4 The learned Counsel appearing for the Applicant contended that the matter was heard on various occasion and by the impugned order dated 25th November 2014, the learned Special Judge i.e. Sessions Court directed the Applicant to remain present on the next date without fail. He further contended that the Special Judge does not have the power to direct the accused to remain present during the pendency of hearing of the Application for cancellation of bail. He placed reliance on the unreported judgment of the learned Single Judge of this Court in Criminal Application No.2510 of 2008 (Deepak Gopaldas Bajaj Vs. Union of India & Ors.) and

submitted that the present Application deserves to be allowed in view of the ratio laid down by the High Court.

5 Heard the learned Counsel appearing for the Applicant and the learned APP. Perused the record annexed to the present Application. It is pertinent to note here that the learned Single Judge of this Court in Criminal Application No.2510 of 2008 was dealing with the similar situation wherein the question for consideration by this Court was as under:

“Whether the Court of Sessions while deciding an application for cancellation of bail under Sub-section 2 of Section 439 of the Code of Criminal Procedure Code, 1973 has a power to direct the accused to personally remain present before the Court during the pendency of the application for cancellation of bail?.”

This Court after analyzing various provisions of the Cr. P.C. and in particular Section 439(2) has held that:

“In the present case we are dealing with the question whether the Sessions Court possesses a power of compel presence of an accused during the pendency of an application under Sub-section 2 of Section 439 of the Code of Criminal Procedure, 1973 especially when the trial is not pending before the Court of Sessions. On perusal of the Code it is apparent that there is no such of power vesting in the learned Sessions Judge. This is a case where there is a total absence of a power and as stated earlier, there is no inherent power vesting in the Session Court which could be exercised for ensuring the personal presence of the accused. If the case against the accused was pending before the Sessions Court which is considering the application for cancellation of bail, the position would have been different. If this Court is dealing

with an application for cancellation of bail, in view of inherent power under Section 482 of the said Code, this Court can in an appropriate case issue direction to the accused to personally remain present at the time of hearing of application for cancellation of bail. However, a Court of Sessions does not have that power.

6 There cannot be any quarrel about the law laid down by this Court in the above decision in Criminal Application No.2510 of 2008. In the present case also there is no trial pending before the Sessions Court and the Misc. Application bearing No.2075 of 2014 has been filed by the original Complainant under the provisions of Section 439(2) of the Cr. P.C.. In view of the ratio laid down by this court in the aforesaid judgment, I am satisfied that the present Application deserves to be allowed in terms of prayer clause (a). However, it is made clear that if the Special/Sessions Court allows the Application under Section 439(2) of the Cr. P.C., the consequences under the law would certainly follow.

7 Criminal Application is accordingly allowed.

(A.S. GADKARI,J.)