

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2015

CORAM:

THE HON'BLE MR.JUSTICE S. VAIDYANATHAN

Crl.O.P. No.9121 of 2013

Manikka Thyagarajan

.. Petitioner /
Interveing Petitioner/
in W.P.No.20171/2012

Vs.

1. Dr. C.S. Meenatchi
2. Mr. C. Natesan
3. State, represented by
the Inspector of Police,
E2, Royapettah Police Station,
Chennai

..Respondents/
/Accused/Complainant

Criminal Original Petition filed under Section 439(2) r/w.482 and 483 of Cr.P.C., praying to cancel the bail granted to respondents 1 and 2 herein in Crl.M.P.No.945 of 2013 dated 25.3.2013 by the learned XVIII Metropolitan Magistrate, Saidapet, Chennai in Crime No.972 of 2012 on the file of 3rd respondent.

For Petitioner : Dr.C. Ravichandran

For Respondents : M/s.L. Ramu and
C. Dinesh Kumar for R1 and R2

Mr. Ayyapparaj
Government Advocate
(crl.side) for R3

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O R D E R

This petition has been filed to cancel the bail granted to the respondents 1 and 2/accused by the learned XVIII Metropolitan Magistrate, Saidapet, Chennai in Crl.M.P.No.9121 of 2013 in Crime No.972 of 2012 on the file of 3rd respondent.

2. Heard the learned counsel for petitioner, learned counsel for

respondents 1 and 2 and learned Government Advocate (crl.side) appearing for the 3rd respondent.

3. The facts of the case is as follows;

(i) The Petitioner is defacto complainant in Crime No.972 of 2012 on the file of 3rd respondent police which was registered against the respondents 1 and 2 for an offence under Sections 406 and 420 of IPC. The respondents 1 and 2 herein moved anticipatory bail petition in CrI.O.P.No.20171 of 2012 before this Court and this court dismissed the same. Thereafter the respondents 1 and 2 moved CrI.M.P.No.945 of 2013 before the learned XVIII Metropolitan Magistrate, Saidapet, Chennai seeking bail under Section 437 of Cr.P.C. On 19.3.2013 petition seeking bail to enlarge the respondents 1 and 2 was filed and the surrender petition purported to surrender respondents 1 and 2 before the said court was filed on 20.3.2013.

(ii) The learned XVIII Metropolitan Magistrate has granted bail to the respondents 1 and 2 on 25.3.2013 in CrI.M.P.No.945 of 2013. Against the order granting bail to the respondents 1 and 2 on 25.3.2013, the petitioner has come forward with this present petition for cancellation of bail granted to the respondents 1 and 2.

4. Learned counsel for petitioner Dr.C.Ravichandran would submit that a complaint was lodged against the respondents 1 and 2 by the petitioner herein alleging that they have cheated many people and the same was registered in Crime No.972 of 2012 and the anticipatory bail petition moved by respondents 1 and 2 came to be dismissed on 15.3.2013 on the ground that there is every possibility of tampering the witnesses which would affect the process of investigation. While dismissing the petition, liberty was given to the respondents 1 and 2 to approach the concerned Magistrate and apply for regular bail and on filing such bail application, the learned Magistrate is directed to consider the same on merits and in accordance with law.

5. He further submitted that the respondents 1 and 2 have filed their bail application before the XVIII Metropolitan Magistrate, Saidapet on 19.3.2013 under Section 437 of Cr.P.C., and thereafter they filed surrender petition on 20.3.2013 and after considering the same, the learned XVIII Metropolitan Magistrate, Saidapet has enlarged the respondents 1 and 2 on bail on 25.3.2013 by stating that the complaint has been lodged with a delay of 3 years from the date of occurrence and since the respondents 1 and 2 were aged 60 years and they are suffering from physical ailments which is supported by medical certificates and the case entirely rests on documentary evidence and there is no possibility of hampering the evidence.

6. He further submitted that the respondents 1 and 2 filed bail application on 19.3.2015 and filed surrender petition on 20.3.2015 and they surrendered only on 25.3.2015. But in the docket order

passed in CrI.M.P.No.945 of 2013, on 20.3.2015, the learned XVIII Metropolitan Magistrate has observed as follows;

"Police reply not received. I perused the records. The petition is not maintainable as per section 437 of Cr.P.C. The petitioners neither arrested, nor remanded either by police or by this Hon'ble Court. The surrender petition also not filed. The accused also not appeared before this court, so the petition is not maintainable as per law or on facts of the case. The petition has to be dismissed."

He contended that bail will come only after surrendering of the accused before the concerned Magistrate after passing a remanding order and thereafter only bail petition should be entertained, but the perusal of bail petition in CrI.M.P.No.945 of 2013 dated 19.3.2013 did not disclose the fact that the respondents 1 and 2 were remanded in judicial custody or arrested or detained by 3rd respondent and the condition precedent for bail is, arrest or detention by the police. In para 5 of the status report filed by the 3rd respondent, it is stated as follows;

"5. It is submitted based on the direction of Honourable High Court, A1 and A2 filed a bail petition before the learned XVIII Metropolitan Magistrate Court, Saidapet in CrI.M.P.No.945 of 2013 on 19.3.2013 and surrendered on the next day (i.e. On 20.03.2013) and subsequently enlarged on bail on 25.3.2013."

7. Even in CrI.M.P.No.945 of 2013, the learned Magistrate has stated that the accused/respondents after filing regular bail petition, they have surrendered before the lower court on that day, but the respondents 1 and 2 have not surrendered before the Magistrate Court on 20.3.2013, but they have filed surrender petition on 20.3.2013 as if they were surrendered and the same was stated by the learned Magistrate in docket order dated 20.3.2015.

8. He would further contend that when this matter came up for hearing before this Court, this court has called for the records from the learned XVIII Metropolitan Magistrate, Saidapet, Chennai pertaining to CrI.M.P.No.945 of 2012 on 29.4.2013, but the respondent police has filed their status report only on 12.8.2015. In the typed set filed by respondents 1 and 2, it has been stated in CrI.M.P.No.945 of 2013 on 20.3.2015, for want of police reply, call on 22.3.2013. This is the original endorsement. Thereafter the same was struck off and a new endorsement has been made in the date of 20.3.2015. They have created the same only on 8.7.2015 and they have obtained copy on 8.7.2015 which clearly shows that there is manipulation of records.

9. In CrI.O.P.No.20171 of 2012 in Crime No.972 of 2012, in para 9, this Court has stated that the petitioners are at liberty to

approach the Magistrate concern and apply for regular bail and on filing such bail application, the learned Magistrate is directed to consider the same on merits and in accordance with law. But the respondents 1 and 2 filed have their bail petition on 19.3.2013 and surrender petition on 20.3.2013 and surrendered before the court only on 25.3.2013 , on which date bail has been granted to the respondents 1 and 2.

Section 437(1) of the Code of Criminal Procedure code says as follows:

"When any person accused of , or suspect of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or court of Sessions, he may be released on bail."

From the above, it is seen that the accused persons who is suspected of commission of non-bailable offence must have been arrested or detained without warrant by an officer in charge of the police station, or appear before the court other than a court of Sessions of High Court can claim bail under the section.

10. In this case, the accused/respondents 1 and 2 were not arrested and never suffer judicial custody and there is no record in the order of the learned Magistrate that they were sent to judicial custody. The bail petition was filed on 19.3.2013 and surrender petition was filed on 20.3.2015, but they were surrendered only on 25.3.2015, learned Magistrate has passed an order granting them bail stating that the accused/respondents 1 and 2 were aged 60 years and they have produced medical records stating that they are having physical ailment and the case stands on material evidence and document. Hence the order passed by the learned XVIII Metropolitan Magistrate, is perverse and not sustainable in the eye of law and the act of the learned Magistrate is gross abuse of process of law which requires interference of this Court. Thus he prayed for cancellation of bail granted to the respondents 1 and 2 by the learned Magistrate.

11. Learned counsel Mr. L. Ramu, appearing for the respondents 1 and 2/accused submitted that in the bail order passed by the learned Magistrate, there is no allegation of misuse of liberty or violation of Section 439(1) of Cr.P.C. If the accused appear before the learned Magistrate, then the Magistrate accepts the surrender and will grant bail. Even though the bail application was filed on 19.3.2013, surrender petition was filed on 20.3.2015.

12. He would further submit that the learned Magistrate was pleased to grant bail to the respondents 1 and 2 taking into consideration of the fact that the complaint has been given belatedly after three years from the date of alleged occurrence as the alleged

occurrence said to be taken place between the period 01.10.2007 and 24.09.2009 and the alleged complaint was given on 19.08.2012. Further in the impugned order, it was observed that the respondents 1 and 2 are aged persons and they are suffering from ailments, in support of which, documents have also been produced and based on the medical records, the bail order has been passed within the ambit of Section 437(i) of Cr.P.C and the same is correct and also need not to be interfered with.

13. In support of his contention, he would rely upon the decision of this Court reported in 1982 CrL.J.2109 (Khagendra Nath Bayan and another Vs. The State of Assam), wherein, it is held that "Infirm", according to the Concise Oxford Dictionary means "physically weak, specially through age". According to Webster's New Twentieth Century Dictionary, 'inform' means weak, not strong; not firm or sound physically; feeble. Infirmary is naturally concomitant with old age.

14. He also relied upon the decision of the Gauhati High Court reported in CrL.J.1816 (State of Assam V Mobarak Ali and others), wherein, it is held that the term "appears" in Section 437 means and includes voluntary appearance before the court without intervention of any agency and the act of surrender before the court coupled with submission to its direction. These are implicit in Section 437. As such, when a person accused of a non-bailable offence voluntarily appears before the court and remains in physical control of the Court and prays for bail, the Magistrate is empowered to grant bail to him if he is so entitled. Such a bail not being asked for in apprehension of arrest, it cannot be said that the Magistrate exercises the powers under Section 438 which are not vested in him. The granting of bail by the Magistrate in such circumstances is well within the scope of section 437.

Thus, from the above citation, it is seen that the term "appears" means and includes voluntary appearance before the court without intervention of any agency and the act of surrender before the court coupled with submission to its direction. Hence once the accused surrenders before the Magistrate, he has got power and also jurisdiction to grant bail. There is no allegation of misuse of liberty or tampering with evidence and the accused/ respondents 1 and 2 herein are complying with the conditions nearly about 6 months and now the conditions are also relaxed. Hence the order passed by the Magistrate is correct in the eye of law and the same should not be interfered with by this court, thus he prayed for dismissal of this petition.

15. Learned Government Advocate (crl.side) submitted that the respondent police has filed its status report as directed by this court. Though the respondents 1 and 2/accused have filed their

bail application prior to their surrender, after considering all the aspects, the Magistrate came to the conclusion and granted bail. Therefore after considering all the merits and totality of circumstances, bail order has been granted and hence he prayed for dismissal of this petition.

16. In reply, learned counsel for the petitioner submitted that the Magistrate has committed illegality in the order granting bail as the respondents have surrendered only on 25.3.2013 and even on 25.3.2013, surrender was not accepted and the respondents 1 and 2 / accused were not remanded to judicial custody. The respondents 1 and 2/accused must be in judicial custody and then only petition for bail can be entertained.

17. In support of his contention, he relied upon the judgment of the Apex Court reported in (1980) 2 SCC 559 (Niranjan sing and another vs. Prabhakar Rajaram Kharote and others), wherein it is held that the meaning of "custody" includes physical surrender by the accused before the court and submission to its directions.

18. On a perusal of typed set of papers filed by respondents 1 and 2, it is seen that on 19.3.2013, notice was issued in CrI.M.P.No.945 of 2013 and thereafter notice was taken and on 20.3.2013, there was a hand written statement that for want of police reply, call the matter on 22.3.2013. Subsequently it was struck down and a fresh endorsement was made and this has not been reflected in the order. It is submitted that this endorsement has been made only on 8.7.2015 as could be seen in the endorsement. It is submitted that this Court while dismissing the anticipatory bail filed by the accused/respondents 1 and 2 has held that they are at liberty to approach the Magistrate concerned and apply for regular bail and on filing such bail, the Magistrate is directed to consider the same in accordance with law.

19. The counsel for petitioner would draw the attention of this Court that if the anticipatory bail is granted to the respondents 1 and 2, there is every possibility of tampering the records which would affect the investigation. He further submitted that the accused have tampered the records and that earlier endorsement was cancelled and subsequent endorsement was made, as was reflected in CrI.M.P.No.945 of 2012. It is submitted that on 19.3.2013, the respondents 1 and 2 have filed application for bail under section 437 of Cr.P.C., and thereafter surrender petition was filed on 20.3.2015. But actually they did not surrender on 20.3.2013 and they surrendered only on 25.3.2013 and the bail has been granted on 25.3.2015. It is submitted that when a surrender petition was filed, on the same day the respondents 1 and 2 will have to surrender themselves, subsequent thereupon, a bail petition has to be filed.

20. Learned counsel for respondents 1 and 2/accused pointed out that it is only a civil dispute with regard to a land and the action of the defacto complainant is unnecessarily making allegations against the accused/respondents 1 and 2 herein which is not warranted and in terms of Section 437 of Cr.P.C., if the accused persons appear before the Magistrate, the matter will have to be considered on the same day and mere filing of the surrender petition is not sufficient is the contention of the complainant/petitioner. It is submitted by the petitioner/defacto complainant that the 3rd respondent police has admitted in the status report in para 5 that pursuant to the orders of this Court A1 and A2 have filed a bail application before the XVIII Metropolitan Magistrate, Saidapet in CrI.M.P.No.945 of 2013 on 19.3.2013 and surrendered on the next day and subsequently the accused were enlarged on bail on 25.3.2015. Further it was contended that admittedly there was no surrender on 20.3.2015 and they surrendered only on 25.3.2013, but the Magistrate has not ordered custody, but he granted bail to the respondents 1 and 2/accused based on their health condition and the surrender is created only for the purpose of this case and that the physical illness suffered by the accused persons /respondents 1 and 2 has not been supported by any documents.

21. On a perusal of a docket order passed in CrI.M.P.No.945 of 2013, it is seen that on 20.3.2013, after the endorsement was cancelled, the lower court has recorded that the petitioner was neither arrested, nor remanded and that the surrender petition will have to be dismissed and posted the matter at the request of both parties on 25.3.2013. On 25.3.2013, the police reply was filed. Since the accused did not appear on 20.3.2013 and they appear on 25.3.2015, the Court below has granted bail. The Court below ought not to have released the accused/respondents 1 and 2 on the same day. Even assuming that they have surrendered on 25.3.2015, the Magistrate ought to have allowed the police to take custody of the accused, permitting them to investigate, so as to enable the police to find whether there is any possibility of recovery of articles, take specimen signature etc. The present case is one of the breach of trust attracting section 420 of IPC and that the accused have cheated to the tune of more than Rs.88 lakhs, I find that there is much force in the contention of the counsel for petitioner/defacto complainant that unless and until the custody of the accused is ordered, the bail petition could not have been entertained, since it is not a procedure contemplated under law and the Court below has lost sight of the same, is acceptable. Therefore this Court is of the view that the order passed by the court below is not sustainable in the eye of law and the same is liable to be set aside and accordingly it is hereby set aside and this petition for cancellation of bail is allowed.

22. The 3rd respondent is directed to secure the custody of the accused/respondents 1 and 2 in accordance with law.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

msr

To

1. The XVIII Metropolitan Magistrate,
Saidapet, Chennai.
2. The Inspector of Police,
E2, Royapettah Police Station,
Chennai.
3. The Public Prosecutor,
High Court, Chennai

+1 cc to Mr.Dr.C.Ravichandran,Advocate(SR.49021)

CrI.O.P.No.9121 of 2013

pur (co)
cp 07/09/2015

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