



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.10.2015

CORAM:

THE HONOURABLE MRS.JUSTICE S.VIMALA

Criminal Revision Case (MD)No.453 of 2015
and
M.P.(MD)No.1 of 2015

Pushpa Ardhar

.. Petitioner

Vs.

1.State rep. by its
Sub Inspector of Police,
Vadasery Police Station,
Vadasery,
Kanyakumari District.

2.J.Jeyaselvam

.. Respondents

Revision is filed under Section 397 r/w 401 Cr.P.C. to call for the records and set aside the order of the learned Judicial Magistrate-II, Nagercoil, Kanyakumari District, dated 20.04.2015 in CrI.M.P.No.2051 of 2015.

For Petitioner : Mr.V.Rajiv Rufus
For R1 : Mr.P.Kandasamy
Government Advocate (crl. side)

ORDER

This revision petition has filed by the petitioner/accused in Crime No.1177 of 2014 of Vadasery police station. The defacto complainant and the petitioner herein are related as tenant and landlord respectively. The tenant has preferred a complaint before the Sub Inspector of Police, Vadasery police station alleging theft, criminal trespass and causing damage to the property etc. and the case has been registered under Sections 427, 294(b), 506 (i), 447 and 379 IPC.

2.The second respondent has been served and acknowledgement dated 19.10.2015 has been filed as proof of service. Notice has been taken by speed post. No appearance or no representation on service of process on the second respondent. Even on prior occasion, when notice was ordered, the second respondent did not appear before this Court.



3. The sum and substance of the complaint is that the accused entered into the house of the defacto complainant, where he is residing as a tenant and caused theft of properties worth about Rs.16 lakhs and thereafter, the accused moved the Court for anticipatory bail and as it was dismissed by the District Court as well as by the High Court, he approached the Hon'ble Supreme Court. The Hon'ble Supreme Court directed the accused to surrender before the concerned Court and to file the bail application and the Court was directed to consider the bail application within a period of one week thereafter.

4. Accordingly, she filed bail application and the same was ordered without notice to the learned Additional Public Prosecutor. Alleging that there is a violation of the bail order granted, the application for cancellation of bail has been moved by the defacto complainant. That application seeking cancellation of bail has been ordered by order dated 20.04.2015 by the learned Judicial magistrate No.II, Nagercoil and this order is under challenge in this revision petition.

5. Rejection of bail application and the cancellation of bail already granted are two different stages and the Courts are expected to exercise the circumspection in cancelling the order of bail already granted. Only under specified grounds, the bail already granted can be cancelled. Some of the circumspection, in which, cancellation of bail has been justified are listed hereunder:-

"It is well settled that the **grounds** for **cancellation** of **bail** under Section 437(5) and 439(2) of the Code are identical, namely, **bail** granted under Section 437(1) or 439(1) of the Code can be cancelled broadly when one or more of the following conditions are fulfilled:

- (i) The accused misuses his liberty by indulging in similar activity,
- (ii) Interferes with the Course of investigation,
- (iii) Attempts to tamper with the evidence,
- (iv) Threaten witnesses or indulges in similar activities which would hamper smooth investigation,
- (v) There is likelihood of the accused fleeing away to another country.
- (vi) Attempts to make himself scare by going underground graver offence.

18. The **grounds** referred to above are illustrative and not exhaustive.

6. The contention of the learned counsel for the revision



petitioner is that the Court below did not consider the high handed action and the malicious intention on the part of the defacto complainant, who has committed default in payment of rent to the extent of Rs.9 lakhs and he has abused the process of law in order to cause threat to the landlady and therefore, the order of cancellation of bail should be set aside.

7.It is the case of the landlady that after the defacto complainant vacating the shop, he has again re-entered into the property and has given this false First Information Report only in order to evade the rent due.

8.Before cancellation of bail whether notice has been served upon the revision petitioner herein is the primary issue. The perusal of the order passed by the learned Magistrate would go to show that notice has been affixed on the conspicuous part of the house and that has been held sufficient. But it is stated by the revision petitioner that no such notice was affixed in the house. In the order, there is a finding that as the revision petitioner was not available at home, it is deemed that the revision petitioner has escaped from the clutches of law. Whether this finding is warranted, is yet another issue raised.

9.The first reason assigned by Court below in ordering cancellation is that the bail order itself has been granted against the principles of natural justice and against the principles of law in not ordering notice to the learned Assistant Public Prosecutor.

10.The first question is whether this mistake has been committed by the Court or by the accused?

11.This Court called for a report from the learned Magistrate and from the report of the learned Magistrate, it is clear that it is the Court, which has not chosen to order notice. Perhaps, carried away by the order passed by the Hon'ble Supreme Court, the learned Magistrate should have chosen to grant bail without notice, without fully understanding the import of the order passed by the Hon'ble Supreme Court. For the mistake committed by the Court, the accused cannot be penalised.

12.The second reason given in the order for cancellation of bail is that the property, which is alleged to have been committed theft of, has not been recovered and the presence of the accused may be necessary to secure the custody of the property.

13.These factors ought to have been considered only at the stage of granting bail and not at the stage of cancellation of bail. Therefore, the second reason also is not sustainable.



14. The third reason stated is that the accused herein was not co-operating for the investigation of the case and therefore, it is a fit case for cancellation of bail.

15. The learned counsel for the revision petitioner submitted that the prosecution or the Investigating Officer never called the accused for the purpose of interrogation and there is an undertaking that whenever the revision petitioner is called, by the Investigating Officer, the accused will co-operate for the investigation and she will appear before the concerned police.

16. The allegation is not specific as to when the police wanted the presence of the accused for interrogation and on what ground she did not co-operate. Without giving reasons/explanation/details, it is not fair to say that she did not co-operate for the investigation. It is made clear that whenever the Investigating Officer wants the presence of the accused for investigation, it shall be only by issuing summons to the revision petitioner and on receipt of summons, the accused shall co-operate for the investigation. This condition is imposed for the purpose of ensuring that both parties will not be in a position to allege vague allegations against each other.

17. The reasons stated by the learned Magistrate cannot be sustained for one more reason. The learned counsel for the revision petitioner pointed out the provisions of Section 437 Cr.P.C. and state that if the offence alleged to have been committed by the accused is punishable with death, imprisonment for life or imprisonment for not less than 7 years, notice to Assistant Public Prosecutor is not mandatory. The offence for which the case has been registered is one under Sections 427, 294 (b), 506(i), 447 and 379 IPC, which are punishable upto the maximum of only three years and therefore, as per Section 437 IPC, no notice is contemplated to the learned Assistant Public Prosecutor for the purpose of releasing the accused on bail.

18. Under such circumstances, all the reasons given by the Court ordering cancellation is unsustainable and it cannot be sustained in the eye of law and therefore, it is liable to be set aside.

19. The learned counsel for the revision petitioner would submit that the cancellation of bail without due notice to the revision petitioner herein is highly objectionable and therefore, on this ground, it has to be set aside. As the cancellation of bail involves, curtailment of liberty, it is imperative to ensure service of notice before cancellation of bail. Even though an attempt was made to serve notice on the accused, the Court could record only a deemed service. On this ground also, as the cancellation has been ordered without due notice to the accused,



it is liable to be set aside.

20. In the result, the Criminal Revision Petition is allowed and the order passed by the court below is set aside. Consequently, connected Miscellaneous Petition is closed.

21. However, the learned Government Advocate (crl. side) would submit that appropriate conditions must have been imposed by the Court atleast while granting bail. It is not in dispute that she is a holder of passport and she is in the habit of going abroad. Therefore, in addition to the earlier conditions, the petitioner shall get prior permission to go abroad, before the learned Magistrate, before whom complaint is pending.

Sd/-

Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar

To

1. The Judicial Magistrate-II, Nagercoil,
Kanyakumari District.

2. The Sub Inspector of Police,
Vadasery Police Station,
Vadasery, Kanyakumari District.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai

+1cc to Mr. V. Rajiv Rufus, Advocate Sr.No. 62999

rj2

AA/AMF/17.11.2015/5p-5c

Cr1.R.C. (MD) No. 453 of 2015

27.10.2015