

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO.117 OF 2016**

SMT. TULIKA KATARE APPLICANT

V/S

THE STATE OF GOA,
THR. ITS PSO AND 2 ORS. . . .RESPONDENTS

Shri K. Poulekar, Advocate for the Applicant.
Shri S.R. Rivankar, Public Prosecutor for
Respondents No.1 & 3.
Shri S. Dessai, Senior Advocate with Shri
Pavithran A.V., Advocate for Respondent No.2.

CORAM : C.V. BHADANG, J.

DATE : 23rd AUGUST, 2016

ORAL ORDER :

This is an application under Section 439 read with Section 482 of the Code of Criminal Procedure for cancellation of the anticipatory bail granted to the respondent no.2 by the learned Sessions Judge vide order dated 16/03/2016 in Anticipatory Bail Application no.54/2016.

2. The brief facts are that an offence at

Crime No.17/2016 came to be registered against the respondent no.2 with PS Anjuna under Section 328 and 376 of the Indian Penal Code. As per the complaint dated 11/02/2016 lodged by the victim girl in the night intervening between 10th and 11th of February, 2016 in hotel room no.11 at Vagator, the second respondent had allegedly laced the drink of the victim with some stupefying substance and had sexually assaulted her. Accordingly, the crime was registered. The applicant sought transit bail from the principal seat of this Court which was granted on 10/03/2016. Thereafter, the second respondent approached the learned Sessions Judge seeking anticipatory bail. The learned Sessions Judge vide order dated 16/03/2016 has granted the pre-arrest bail to the second respondent subject to certain conditions as to attendance. In pursuance of the same, the second respondent was formally arrested and has been released on bail.

3. The applicant claims that the learned Sessions Judge granted bail without perusing the FIR and without considering the nature of the allegations which are serious. It is contended that the learned Sessions Judge has not properly considered the "voluminous evidence available on record" to substantiate the allegations. It is contended that looking to the gravity of the offence, the learned Sessions Judge was in error in granting pre-arrest bail.

4. I have heard the learned Counsel for the applicant and the learned Public Prosecutor at length. I have also heard the learned Senior Counsel for the second respondent.

5. The learned Counsel for the applicant has strenuously urged that the Investigating Officer is only looking into the plea of alibi set up by the second respondent and has allegedly collected the CCTV footage which showed that the second respondent was attending

a function at Ulhasnagar on the relevant date. The learned Counsel has pointed out that the case made out by the second respondent, (as to the particulars of the said function) is discrepant. The learned Counsel submitted that this shows that investigation is being carried out in a colourable and prejudiced manner and for the purpose of proper investigation, the bail granted to the second respondent is liable to be cancelled. The learned Counsel for the applicant has placed reliance on the decision of the Supreme Court in the case of **R. Rathinam V/s. State, (2000) 2 SCC 391**, in order to submit that an application for cancellation can be filed by any person from the public. He points out that in the present case the applicant is the aggrieved party/victim.

6. On the other hand, the learned Senior Counsel for the second respondent has submitted that this is a case in which the second respondent has been framed. The learned Senior

Counsel has pointed out that there is a property dispute between the second respondent and one Anil B. Jaisinghani in respect of which the second respondent has lodged various complaints against the said Anil B. Jaisinghani. It is submitted that Anil B. Jaisinghani with the connivance of the victim has managed to frame the second respondent. The learned Senior Counsel points out that, primarily it is for the Investigating Officer and the State to seek cancellation of the bail, if at all the custody of the accused is required for the purposes of investigation. The learned Senior Counsel points out that the bail cannot be lightly cancelled on the basis of a private vengeance of the applicant herein.

7. The learned Public Prosecutor, on instructions, from the Investigating Officer also opposes the application. It is submitted that the investigation made so far does not show that the custody of the second respondent is

required for the purpose of investigation. The learned Public Prosecutor points out that the relevant entry in the register maintained at the hotel has been sent for the examination by an handwriting expert and the report is awaited. The learned Public Prosecutor further points out that the owner of the concerned hotel and the manager have failed to identify the second respondent at the identification parade conducted during the course of the investigation. On the contrary, the investigation made so far discloses that the said owner and the manager had identified Anil B. Jaisinghani (on the basis of the photographs) to be the person who was accompanying victim during the relevant period. He, therefore, submits that the application may be rejected.

8. I have carefully considered the rival circumstances and the submissions made.

9. In the case of **R. Rathinam** (supra), six

persons belonging to Scheduled Caste Community were done to death in a carnage in which some members of the bar had moved for cancellation of bail. The Division Bench of Madras High Court had eventually closed the *Suo Motu* proceedings which order was subject matter of challenge before the Supreme Court. The Supreme Court held in para 8 thus:

8. It is not disputed before us that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. Nor is it disputed that the said power can be exercised *suo motu* by the High Court. If so, any members of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power *suo motu*. There is no barrier either in Section 439 of the Code or in any other law which inhibits a person from moving the High Court to have such powers exercised *suo motu*. If the High Court considers that there is no need to cancel the bail for the reasons stated in such petition, after making such considerations it is open for the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court feels that the reasons stated

in the petition are sufficient enough for doing so. It is, therefore, improper to refuse to look into the matter on the premise that such a petition is not maintainable in law.

10. It can thus be seen that the powers under Section 439(2) of Criminal Procedure Code can be exercised by this Court either suo motu or at the instance of the victim/aggrieved party. In the present case, it happens to be by a victim. Thus the existence of such power to consider a prayer for cancellation of the bail cannot be disputed. The question whether such power needs to be exercised would depend upon facts and circumstances of each case. It is trite that the existence of the power and its exercise are two distinct aspects.

11. In the present case, the second respondent has been granted anticipatory bail by the learned Sessions Judge on 16/03/2016 and the investigation is stated to be in progress. The

learned Public Prosecutor has pointed out from the case diary that the victim was intimated to remain present for the purposes of recording her statement under Section 164 of the Criminal Procedure Code. It is pointed that one of such intimations has also been served on the basis of acknowledgment. However, the victim has failed to remain present for recording her statement under Section 164 of the Criminal Procedure Code. Be that as it may, it is now well settled that an order for cancellation of bail cannot be lightly granted. In a case of the present nature, where the cancellation of anticipatory bail is sought, it will have to be shown that the custodial interrogation of the accused is necessary. In a given case, such cancellation may be sought on the basis of some subsequent events in the nature of disclosure of important material and piece of evidence against the accused during the course of the investigation carried out subsequent to the grant of anticipatory bail. There may be a case where

the accused has misused such bail. In my considered view, none of these circumstances are forthcoming in this case. It is primarily for the Investigating Officer to claim that the custodial interrogation of the accused is necessary for the purpose of instigation which the Investigating Officer is not claiming in this case. There are also no allegations of any misuse of the bail granted. In so far as the prima facie case against the second respondent is concerned, it would appear that an identification parade was conducted in which the owner of the hotel and its Manager had failed to identify the second respondent. Furthermore, prima facie, at this stage there is a CCTV footage obtained which shows that the second respondent had attended wedding ceremony on 10/02/2016 at Ulhasnagar. The learned Sessions Judge has also observed that on 11/02/2016 the second respondent was present in the office of his advocate. The learned Sessions Judge also noted that according to the Investigating

Officer no incriminating articles were found at the spot and the victim did not narrate the incident to the hotel staff while leaving the hotel. The learned Sessions Judge has further noticed that according to the Investigating Officer CDR details of the mobile of the second respondent shows that the second respondent was present in Mumbai on 10/02/2016. I would hasten to add that these are only prima facie observations for the limited purpose of deciding the application for cancellation of bail and would not be binding at the trial, if any.

14. Having carefully considered these circumstances, I do not find that a case for cancellation of bail is made out. The application is without any merit and is accordingly dismissed. It is made clear that this order would not come in the way of the Investigating Officer from seeking appropriate order for cancellation of the bail or otherwise if the Investigating Officer finds that the

custody of the second respondent is necessary
for the purpose of the investigation.

C.V. BHADANG, J.

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