

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.273 OF 2018

Gautam Bohra,
R/o.114, Shanta Industrial Estate,
I.B.Patel, Goregaon (East), Mumbai-400 063. Applicant

versus

1. The State of Maharashtra
2. Manon Singh Thakur, R/o.B-806,
Unique Heights, Poonam Garden,
Mira Road (E), Thane. Respondents

Mr.Rishi Bhuta with Mr.Ashish Dubey I/by Ujjwal Gandhi for applicant.

Mr.Niranjan S. Mundargi I/by D.H.Shukla for respondent no.2.

Mr.Arfa Sait, APP, for State.

Mr.Sanjay Govilkar, Police Inspector, EOW, present.

CORAM : PRAKASH D. NAIK, J.

DATE : 17th October 2018

PC :

1. This is an application challenging the order passed by learned Sessions Judge dated 21st February 2018 setting aside the order dated 27th November 2017 and 11th January 2018 passed by learned Additional Metropolitan Magistrate, 47th Court, Esplanade, Mumbai in Case No.791/Misc/2017 arising out of CR No.113 of 2016. The applicant is original complainant, who had lodged first information report at Kherwadi Police Station for offences under Sections 420 and 406 of Indian Penal Code vide CR No.113 of 2016. The applicant was arrested in the aforesaid crime and he was produced before the remand Court. He was remanded to custody. Thereafter respondent no.2 preferred an application for bail before the learned Magistrate. At that time, respondent no.2 and his family members expressed their desire to settle their matter and pursuant to that,

consent terms were executed. In accordance with the consent terms the complainant-applicant gave his no objection for grant of bail to respondent no.2. The respondent no.2 gave six cheques towards full and final settlement of the amount. The consent terms were filed before the Court of learned Magistrate. By order dated 2nd June 2017 the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai granted bail to respondent no.2 on his executing P.B. of Rs.2,00,000/- with solvent surety of like amount, in addition to cash security of Rs.50,000/-. It was also directed that the applicant shall not leave Mumbai and Thane without permission of the Court. The order also stipulated other conditions.

2. The investigating officer and learned APP had filed say and opposed the application for bail. Learned Additional Chief Metropolitan Magistrate, however, observed that going through the record it makes clear that compromise has taken place between the complainant and the accused. The evidence is documentary and hence there is least chance of tampering the evidence. Respondent no.2 thereafter availed of the bail facility. In accordance with the consent terms, respondent no.2 was to honour the cheques in the amount of Rs.3,40,00,000/-. The applicant deposited the cheque dated 17th June 2017 which was issued for Rs.56,66,667/-. The said cheque was dishonoured with remark "funds insufficient". There was breach of the clause of consent terms. The applicant preferred application for seeking cancellation of bail for flouting the order as well as breach of condition and breach of consent terms. The said application was preferred before the Court of learned Magistrate on 29th June 2017.

3. The investigating officer had filed report before the learned Magistrate indicating that respondent no.2 had committed breach of the condition viz not to leave Mumbai and Thane and had gone to Uttar Pradesh in the months of June and July-2017. Learned Magistrate considered the submissions advanced by both the parties and report submitted by police and vide order dated 27th November 2017, bail granted by the said Court vide order dated 2nd June 2017 was cancelled and respondent no.2 was directed to surrender on or before 12th December 2017. However, respondent no.2 did not surrender in accordance with order dated 27th November 2017 and hence an application was preferred by the investigating officer before the learned Magistrate on 11th January 2018 indicating that respondent no.2 has not surrendered despite the order of this Court. The report also indicated that several other cases were registered against the respondent no.2 in Uttar Pradesh. It was also stated that cheque issued in accordance with the consent terms were dishonoured. Learned Magistrate issued non-bailable warrant against respondent no.2 vide order dated 11th January 2018. The respondent no.2 preferred a fresh application before the learned Magistrate and pending the said application, he preferred criminal revision application before the Sessions Court challenging the order dated 27th November 2017.

4. The revision application was heard by learned Sessions Judge. By order dated 21st February 2018 in exercise of revisional powers, the Sessions Court set aside the order passed by the learned Magistrate cancelling bail as well as issuing non bailable warrant against respondent no.2. Being aggrieved by the aforesaid order, the complainant-applicant has preferred this application.

5. Learned counsel for applicant urged several contentions assailing the impugned order passed by Sessions Court. It is submitted that respondent no.2 has flouted the order of Trial Court. He has committed breach of consent terms. Learned Magistrate considered grant of bail in view of consent terms executed between the parties and although the investigating officer had opposed grant of bail, the respondent no.2 was released on bail. Six cheques issued by respondent no.2 in accordance with consent terms, were dishonoured. It is further submitted that learned Sessions Judge had passed the order without jurisdiction. The impugned order reflects total non application of mind. The revision application challenging the order passed by learned Magistrate cancelling bail, is not maintainable in law. Learned Sessions Judge has failed to take into consideration provisions of Section 437(5) of Code of Criminal Procedure, 1973 and committed an error in arriving at a conclusion that learned Magistrate could not have exercised the powers u/s 439(2) of Cr.P.C. It is submitted that respondent no.2 had no intentions to honour the consent terms and false representations were made before the Trial for granting bail, and had thereby mislead the Court and shown utter disregard to the Court which is evident from the fact that cheques issued by him were dishonoured. The intention to commit breach of the order is evident right from the inception. He further submitted that apart from breach of consent terms, the respondent no.2 has also committed breach of conditions while granting bail. The report filed by police indicated that he has frequently travelled to Uttar Pradesh without seeking permission from the Court in the months of June and July-2017. It is submitted that in respect of surrender, the respondent no.2 had preferred an application before the Trial Court pursuant to cancellation of bail but

did not pursue said application and keeping the said application pending, he preferred revision application before the Sessions Court challenging the said order. The reasons assigned by the Sessions Court are contrary to law.

6. Mr.Bhuta appearing for applicant relied upon judgment of this Court delivered in **Criminal Application No.106 of 2011 (Mahesh Thakkar @ Mahes Manubhai Gadhai Vs. State of Maharashtra and another)** which relates to cancellation of bail wherein it is observed that failing to comply with the promise to repay the amount within stipulated period and the party who obtains favourable order from the Court by voluntarily making a statement, cannot claim that the condition on which bail was granted was bad and that breach thereof should not result in cancellation of bail.

7. Learned APP supported the prayers made in this application. It is submitted that there are several cases registered against respondent no.2 in Uttar Pradesh, Madhya Pradesh and Maharashtra relating to offences of cheating and forgery. It is further submitted that without obtaining permission from the Trial Court, the respondent no.2 had travelled to Uttar Pradesh and committed breach of conditions. It is also submitted that consent terms executed by respondent no.2 before the Court were flouted. He further submitted that offence committed by respondent no.2 itself was serious in nature and as the consent terms were filed by the parties, the learned Magistrate granted bail to him.

8. Learned counsel for respondent no.2 submitted that learned Magistrate ought not to have set aside the order granting bail on the

basis of the application preferred by the applicant. The bail cannot be cancelled for breach of condition. The respondent no.2 had obtained permission from the Court before travelling to Uttar Pradesh and pursuant to the orders of the Court, he had visited Uttar Pradesh. Respondent no.2 has filed the reply opposing reliefs prayed in this application. It is also submitted that the revision application challenging the order of learned Magistrate was maintainable in law. Respondent no.2 had approached this Court by preferring Writ Petition, which was withdrawn on 5th February 2018 with liberty to file appropriate application before appropriate Court. It is, therefore, submitted that pursuant to withdrawal of said writ petition wherein order of learned Magistrate was under challenge, the respondent no.2 had approached the Sessions Court in exercise of revisional jurisdiction. It is submitted that the order cancelling bail for breach of conditions is bad in law and bail ought not to have been cancelled by the same Court. It is also submitted that bail can be cancelled only in overwhelming circumstances and power of cancellation of bail cannot be exercised mechanically. It is submitted that very cogent and overwhelming circumstances are necessary for cancellation of bail. Learned counsel for respondent no.2 relied on following decisions viz :

- (i) Manoj Singh Thakur Vs. State of Maharashtra
(Writ Petition No.348 of 2018);
- (ii) Deep Vs. State of Kunigal
(Criminal Petition No.3365/2014 of Karnataka High Court);
- (iii) Bhagirathsinh Vs. State of Gujarat (1984)1-SCC-284;
- (iv) Biman Chatterjee Vs. Sanchita Chatterjee and others
AIR-2004-SC-1699;

- (v) Pritpal Singh Vs. State of Bihar and others
2002(2)-ACR-1927 (SC);
- (vi) Ashok Meghji Chheda Vs. State of Maharashtra and ors.
(WP No.4850 of 2015, Bombay High Court);
- (vii) Kunal Ganesh Padmakar Vs. State of Maharashtra & others
(Cri.APL No.2 of 2015, Bombay High Court);
- (viii) Manoj Singh Thakur Vs. State of Maharashtra
(Cri.APL No.888 of 2018 – Bombay High Court – pending).

It is therefore submitted that the application is devoid of merits and the same be rejected.

9. I have scrutinized the documents on record. The record indicate that respondent no.2 was arrested for commission of offences under Sections 406 and 420 of Indian Penal Code. Subsequently during the course of investigation charge under Sections 467, 468, 471 and 170 of Indian Penal Code were added. The prosecution case is that accused-respondent no.2 had represented that he is an MLC from Uttar Pradesh and is a member of several committees of the government to win confidence of complainant. He had represented the complainant and the witnesses that he would allot the flats to them from Chief Minister's quota and to induce them to do so he had shown the official documents, rubber stamps etc and had accepted Rs.3,12,86,000/- by cheque, RTGS and cash from complainant and another witness. The promises were not fulfilled and hence FIR was registered. The report filed by the prosecution indicate that there are about nine cases registered against the respondent no.2 and seven of them were registered in various police stations at Uttar Pradesh and Madhya Pradesh and two cases were registered within the State of Maharashtra. It is also

apparent that while the applicant was arrested and the application for bail was preferred by him, consent terms were executed by parties and respondent no.2 had agreed to make payment of Rs.3,40,00,000/- to the applicant herein and had issued six cheques. The complainant had agreed to give no objection for bail subject to compliance of consent terms. In the consent terms it was stated that breach of consent terms would result in cancellation of bail automatically. The said cheques were dishonoured. Bail was granted to respondent no.2. It is true that while granting bail, the Court has also stated that evidence is documentary and there is list chance of tampering the evidence. However, the order begins with the observation that on going through the record it makes clear that compromise has taken place between the complainant and accused. Although the application was opposed by the investigating officer, bail was granted to respondent no.2. On account of breach of order, the applicant-complainant preferred an application before the Trial Court. The report was filed by police indicating that the accused has also flouted the conditions imposed by the Court while granting bail by travelling Uttar Pradesh without permission of Court. Considering the circumstances and after hearing both the parties, bail was cancelled by the Court vide order dated 27th November 2017. While passing the said order the Court has observed that on 25th September 2017 the respondent no.2 had filed an application in this Court in which it was mentioned that he is ready to deposit amount of Rs.25,00,000/- and the cheque of Rs.25,00,000/- was dishonoured. Reference was also made to the consent terms executed between the parties and the fact that respondent no.2 had travelled to Uttar Pradesh without permission of the Court. Respondent no.2 was directed to surrender on or before 12th December 2017. He did not

surrender. The complainant then filed an application for issuance of warrant and the Trial Court issued non-bailable warrant against respondent no.2. Thereafter revision application was preferred before the Sessions Court challenging the order of cancellation of bail as well as order issuing non-bailable warrant. Learned Sessions Judge has set aside the said order issuing non-bailable warrant. On perusal of the impugned order it can be seen that learned Sessions Judge has observed that very cogent and overwhelming circumstances are necessary for seeking cancellation of bail. It was further observed that trend towards granting bail is on account of settled principles of law. The discretion is to be exercised by considering the fact that whether the accused would be available for trial and whether he is likely to abuse the discretion granted to him. The Court also observed that respondent no.2 was allowed to travel out of Mumbai by Court. It was also observed that learned Magistrate is oblivious of the provisions of Section 439(2) of Cr.P.C which powers can be exercised by the High Court or the Court of Sessions. Thus, from the tenor of the order, it is apparent that the learned Sessions Court has exhibited total non application of mind while passing the said order. The provisions of Section 437(5) of Cr.P.C were ignored by the Sessions Court while passing the impugned order dated 21st February 2018. The Court also enlightened by parameters to be considered while granting bail. It is also pertinent to note that permission was granted to travel to Uttar Pradesh in the month of November-2017 and the respondent no.2 had travelled without permission of court in the months of June and July-2017. The Court has failed to take into consideration that bail was sought on the basis of consent terms wherein promise of payment of amount is made and the representations made to the

Court were found to be false and there is apparently no intention to comply the consent terms right from inception. Even the cheque handed over before the Court was dishonoured. The consent terms were executed by accused which would indicate that he had volunteered to make payment in the sum of Rs.3,40,00,000/-. The condition to deposit was not imposed by Court but the accused had volunteered to deposit the money. The nature of crime and the conduct of respondent no.2 did not warrant interference in order cancelling bail. The accused who had sought bail by voluntary statement of deposit cannot claim that the condition on which bail was granted is bad in law. He enjoyed the facility of bail since 2nd June 2017. The factual aspects of this case reflects that there were overwhelming circumstances for cancellation of bail.

10. It is pertinent to note that the circumstances which were put forth by the complainant as well as prosecution were sufficient to pass the order of cancellation of bail. Learned counsel for respondent no.2 had relied upon several decisions which relate to the issue relating to cancellation of bail and it is observed therein that bail has to be cancelled only in exceptional circumstances. He has also relied on the decisions wherein it was observed that the order imposing condition of payment, is bad in law and in such situation bail need not be cancelled. However, in the present case, it is required to be noted that the bail was cancelled for breach of order. The learned Magistrate while cancelling the bail has not only taken into consideration that consent terms were flouted but also the fact that respondent no.2 had committed breach of conditions while granting bail. The condition to deposit was not imposed by Court but the respondent no.2 had volunteered to make payment. The conduct

of accused depicts that sole intention was to seek bail on the basis of false assurance and mislead the Court. In the case of Bhagirath Singh (supra), the Supreme Court has held that cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail. In the case of Biman Chatterjee (supra) bail was granted by Magistrate after noticing that there was possibility of compromise between the parties. The wife made an application stating that the applicant/husband had not co-operated in compromise talks. Bail was cancelled by Magistrate. The Supreme Court observed that bail could not have been cancelled on the ground that accused had failed to keep up his promise. However, in the said decision it was observed that first of all from the material on record, Court did not find that there was any compromise arrived at between the parties and question of fulfilling the terms of such compromise does not arise. In the case of Pritpal Singh (supra), it was observed that bail ought not to have been cancelled for not complying compromise. The dispute relating to eviction of applicant who was tenant of premises owned by respondent. It was agreed that previously applicant would pay certain amount to respondent and vacate the premises. Since the applicant failed to comply compromise, application for cancellation of bail preferred and the bail was cancelled. In the facts of the case, Supreme Court set aside the order of cancellation of bail. The order does not indicate that bail was granted on account of compromise. The decision of this Court in case of Ashok Chheda was decided in the facts of that case. The other orders relied upon by respondent no.2 can also be distinguished on the factual aspects of this case. In the case of Mahesh Thakkar @ Mahes Gadhai, this Court had observed that the question that is required to be determined is whether a party who

obtains favourable orders from the Court by voluntarily making statement, and on the strength of the statement can be latter on, heard to say that he should not be made to face the consequences of the failure to abide by the directions, declared in the order itself. The factual aspects of present case indicate that respondent no.2 was involved in serious crime and on account of consent terms, the Court granted bail. Without going into the aspect whether the revision application was maintainable in law, from the factual aspects of the case and the circumstances stated above, the order of Sessions Court dated 21st February 2018 is required to be set aside as the same is contrary to the provisions of law and the facts did not warrant passing of such an order. The learned Sessions Judge has thus committed an error in setting aside the order passed by learned Magistrate on 29th June 2017.

11. For the reasons stated above, this application succeeds and I pass following order :

ORDER

- (i) Criminal Application No.273 of 2018 is allowed and disposed off;
- (ii) The order dated 21st February 2018 passed by passed by learned Sessions Court for Greater Bombay in Criminal Revision Application No.193 of 2018 is set aside;
- (iii) The applicant shall adhere to the order dated 27th November 2017 passed by 47th Metropolitan Magistrate, Esplanade, Mumbai in Case No.791/Misc/2017 arising out of CR No.113 of 2016 and shall surrender in accordance with the said order.

12. At this stage learned counsel for respondent no.2 submits that respondent no.2 intends to challenge this order before the Apex Court and the order may be stayed for a period of eight weeks. It is noted that bail was cancelled on 27th November 2017 and thereafter the said order was set aside by the Sessions Judge on 21st February 2018. In the circumstances, the order cannot be stayed for a period of eight weeks. However, respondent no.2 is granted four weeks time to surrender before the Court in accordance with order dated 27th November 2017.

(PRAKASH D. NAIK, J.)

MST