

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M No.8805 of 2018

Date of decision : 09.07.2018

Naresh Kumar

.....Petitioner

Versus

State of Haryana and another

...Respondents

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. K. P. Singh, Advocate for the petitioner.

* * *

DAYA CHAUDHARY, J. (Oral)

This petition has been filed under Sections 439 (2) read with Section 482 of the Code of Criminal Procedure, 1973 (for short – 'Cr.P.C.') for cancellation of bail granted to respondent No.2 by the Court of learned Judicial Magistrate First Class, Gurugram vide order dated 02.08.2017 (Annexure P-4) and also for quashing of order dated 07.12.2017 (Annexure P-5) passed by learned Additional Sessions Judge, Gurugram, whereby the appeal for cancellation of bail of respondent No.2 was dismissed.

Briefly, the facts of the case are that respondent No.2 was an accused in case FIR No.485 dated 13.10.2016 under Sections 406, 420, 467, 468, 471, 506, 120-B of the Indian Penal Code, 1860 (for short – 'IPC') registered at Police Station Badshahpur, Gurugram, Distt. Gurugram. He filed a petition for grant of anticipatory bail before the learned Additional

Sessions Judge, Gurugram, which was rejected vide order dated 16.12.2016 and, thereafter, he moved a petition before this Court bearing CRM-M No.2785 of 2017 which was also dismissed on 05.07.2017. Respondent No.2 was arrested and he filed an application for grant of regular bail, which was allowed vide order dated 02.08.2017 on the ground that no recovery was to be effected from him. Petitioner challenged that order of grant of bail to respondent No.2 on the ground that it was granted without assigning any sufficient reason, whereas, his appeal was dismissed vide order dated 07.12.2017 passed by learned Additional Sessions Judge, Gurugram. Thereafter, petitioner has approached this Court by way of filing the present petition for cancellation of bail granted to respondent No.2 vide order dated 02.08.2017 and also for quashing of order dated 07.12.2017 passed by learned Additional Sessions Judge, Gurugram, thereby appeal for cancellation of bail was dismissed.

Learned counsel for the petitioner submits that the bail was granted to accused respondent No.2 without assigning any sufficient reason. The appeal preferred by the petitioner was dismissed without taking into consideration the contents of the appeal. The judicial remand of respondent No.2 was demanded by the police but the same was rejected by the trial Court. It was clear that it was a case of fraud and forgery at the instance of respondent No.2. A forged and fabricated Jamabandi was prepared by respondent No.2 and recovery of ₹80,00,000/- was to be effected from him. But all these facts have not been taken into consideration and application for judicial remand was rejected. Learned counsel submits that on one side

the Investigating Officer was demanding judicial remand for recovery of the amount, whereas on the other side it was mentioned that no recovery was effected. There was a collusion between the Investigating Officer and respondent No.2. At the end, learned counsel for the petitioner submits that respondent No.2 has misused the concession of regular bail as he threatened to withdraw all the cases which were filed by the petitioner against him. Said reason was the sufficient ground for cancellation of bail.

Heard arguments of learned counsel for the petitioner and have also perused the order of granting bail as well as the contents of the FIR and other documents on the file.

Learned Judicial Magistrate First Class, Gurugram allowed the bail of respondent No.2 on the ground that there is no incriminating evidence except the allegations as mentioned in the complaint. Respondent No.2 was released on bail by mentioning that no useful purpose would be served as trial will take long time to conclude. Against order dated 02.08.2017, whereby respondent No.2 was granted bail was challenged before Additional Sessions Judge, Gurugram. The appeal filed by petitioner was also dismissed on the ground that no recovery was effected from accused and no incriminating evidence was there against him except the allegations in the complaint. It has been mentioned by the Appellate court that cancellation of bail under Section 439 (2) Cr.P.C. is to be taken into consideration on the ground as to whether the accused is likely to tamper with evidence or attempt to interfere with the due course of justice or effect the due course of justice. The application for cancellation of bail was filed

only on the ground that earlier anticipatory was rejected by this Court as well as by the lower Court and custodial interrogation was required in the case. By holding that no incriminating evidence except the allegations were there against respondent No.2 in the complaint, application for cancellation for bail was rejected.

Section 439 (2) of the Cr.P.C. provides for the powers of the High Court and the Court of Sessions regarding cancellation of bail granted to accused person. It reads as under:-

"Section 439 - Special powers of High Court or Court of Session regarding bail

(1) * * *

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

Since the submission made by the petitioner center round the interpretation to be placed upon Section 362 of the Code, it may be necessary to have a glance at the same. The heading of Section 362 of the Code provides for the "Court not to alter judgment" and the provision operates as a bar for the court to alter or review its decisions once pronounced. It reads as under :

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

Under Chapter XXXIII, Section 439 (1) empowers the High Court as well as the Court of Sessions to direct any accused person to be

released on bail. Section 439 (2) empowers the High Court to direct any person, who has been released on bail under Chapter XXXIII of the Code to be arrested. The power to cancel the bail granted to an accused person can be passed broadly on the ground *i.e.* (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, *etc.* These grounds are illustrative and not exhaustive.

The scope of this power to High Court under Section 439 (2) has also been considered by Hon'ble the Apex Court in the case of ***Gurcharan Singh and others Vs. State (Delhi Administration) 1978 (1) SCC 118***, wherein, it has been held as under:-

"16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439 (2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under Sub-section (1) to be

arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 489(2). Under Section 439(2) of the new Code, a High Court may commit a person released on bail under Chapter XXXIIL by any Court including the Court of Session to custody, if it thinks appropriate to do so, it must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused, person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

Similarly in another judgment rendered in the case of ***Puran Vs. Rambilas and another 2001 (2) RCR (Criminal) 801***, Hon'ble the Apex Court has held that concept of setting aside an unjustified, illegal or perverse order is absolutely different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some

supervening circumstances warranting such cancellation. In ***Dr. Narendra K. Amin Vs. State of Gujarat and another 2008 (2) RCR (Criminal) 858***, the three-Judge Bench of Hon'ble the Apex Court has also reiterated the aforesaid principle and a distinction has been drawn in granting of bail and cancellation of bail. In the said case, the High Court cancelled the bail granted to the accused in exercise of powers under Section 439 (2) of the Code. In appeal, it was contended that the High Court has erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle as laid down in ***Puran's*** case (supra) observed that when irrelevant materials have been taken into consideration by the Court granting bail, the same makes the said order vulnerable and subject to scrutiny by the appellate Court and no review would lie under Section 362 of the Code. It was also held by Hon'ble the Apex Court that if the order of grant of bail is perverse, the same can be set at naught only by superior court and has left no room for a review by the same Court.

Similar view has been taken by Hon'ble the Apex Court in the case of ***Ranjit Singh Vs. State of M.P. And others 2013 (4) RCR (Criminal) 6090***, wherein, it has been observed as under:-

"20....There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court."

Similarly, Hon'ble the Apex Court in the case of ***Hari Singh Mann Vs. Harbhajan Singh Bajwa 2000 94) RCR (Criminal) 650*** has observed as under:-

"9. There is no provision in the Code of Criminal Procedure authorising the High Court to review its judgment passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such a power cannot be exercised with the aid or under the cloak of Section 482 of the Code.

10. Section 362 of the Code mandates that no court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or an arithmetical error. The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes *functus officio* and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes *functus officio* the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error. The reliance of the respondent on Talab Haji Hussain case is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561-A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the High Court on 7-1-1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment.

11. The impugned orders of the High Court dated 30-4-1999 and 21-

7-1999 which are not referable to any statutory provisions, having been passed apparently in a review petition in a criminal case are without jurisdiction and liable to be quashed."

Hon'ble the Apex Court in the case of ***Central Bureau of Investigation Vs. V. Vijay Sai Reddy 2013 (3) RCR (Criminal) 252*** has cautioned that cancellation of bail necessarily involves the review of a decision, which has already been made and it should be exercised very sparingly by the Court of law.

It is a well settled proposition of law that what cannot be done directly, cannot be done indirectly. While exercising a statutory power, a Court is bound to act within the four corners of the Statute. The statutory exercise of the power stands on a different pedestal than the power of judicial review vested in a Court. The same has been upheld by Hon'ble the Apex Court in ***Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors., (2006) 13 SCC 737, U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey, 2006(1) S.C.T. 77 : (2006)1 SCC 479 and Rashmi Rekha Thatoi and Anr. v. State of Orissa and Ors., 2012(2) R.C.R.(Criminal) 870 : 2012(2) Recent Apex Judgments (R.A.J.) 591 : (2012)5 SCC 690***. It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the precedents and issue directions which are permissible in law.

In the present case, learned counsel for the petitioner has not been able to show anything as to how the order of bail is perverse and how the concession has been misused by respondent No.2. Even no complaint

has been made to the police authority or to the trial Court that respondent No.2 has tampered with the record/evidence or any threat was given to depose in his favour.

In view of the facts as mentioned above, there is no merit in the contentions raised by learned counsel for the petitioner and the petition being devoid of any merit is hereby dismissed.

09.07.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No