

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 820 of 2019**

- Hemant Singh Rajput S/o Late Shri Shobha Singh Rajput
Aged About 39 Years R/o Village - Harnachaka, Police
Station Lalpur, Tahsil - Lormi, District Mungeli Chhattisgarh.,

---- Petitioner**Versus**

1. State Of Chhattisgarh And Another Through The District
Magistrate Mungeli District Mungeli Chhattisgarh.
2. Kailash Singh @ Kaushal Singh S/o Shri Tijau Singh Thakur
Aged About 40 Years R/o Village - Harnachaka, Police
Station - Lalpur, Tahsil - Lormi, District Mungeli Chhattisgarh.,

---- Respondents

For Petitioner	: Shri Sunil Sahu, Advocate
For Respondent No.1/State	: Shri S.K.Mishra, PL
For Respondent No.2	: None present.

Hon'ble Smt. Justice Rajani Dubey**Order On Board****06/05/2019**

Heard counsel for the parties.

2. By this petition filed under Section 439(2) Cr.P.C., the
petitioner has prayed for cancellation of bail granted to the
respondent No.2 vide order dated 26.09.2018 passed in M.Cr.C.
No. 6309 of 2018 in connection with the offence punishable under
Sections 294,506,323,324 and 307 IPC and Sections 25 and 27 of
the Arms Act.

3. In the application filed under Section 439(2) Cr.P.C., the petitioner herein averred that regular bail under Section 439 Cr.P.C. was granted to the respondent No.2 by this Court, rather he obtained bail by suppression and misrepresentation of facts and this Court considered irrelevant material of a substantial nature. It has been further pleaded that some additional facts have been surfaced after grant of bail to the respondent No.2 as he is threatening the applicant and his family members with dire consequences and FIR has also been lodged by him dated 17.03.2019 (Annexure A/3).

4. Heard counsel for the petitioner and State/respondent No.1.

5. The question that appears for consideration in order to entertain the present application under Section 439(2) Cr.P.C. is whether the petitioner had prima facie made out any ground for cancellation of bail under the said Section.

6. It is well settled that the parameter for grant of bail and cancellation of bail are entirely different. Bai granted under Section 439(1) of the Cr.P.C. can be cancelled where (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. It is also well settled that even if two views are possible once the bail has been granted, it should not be cancelled. (See ***Jayendra Saraswathi Swamigal v. State of T.N. and Nityanand Rai v. State of Bihar***).

7. The Constitution Bench of the Supreme Court has considered the scope of power of the High Court under Section 439(2) of the Cr.P.C. in ***Gurcharan Singh v. State (Delhi Administration) and other*** and catalogued the principles governing the powers of the Courts granting and cancelling bail in paragraph 16 of the report which reads 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 has 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 439(2). Under Section 439 (2) of the new Code High Court may commit a person released on bail under Chapter XXXIII by a 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

arises during the progress of the trial after an accused person has been admitted to bail by the High Court. It, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Session 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 Session 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 Session 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-à-vis the High Court.”

8. In a recent judgment, their Lordships of the Supreme Court in the matter of ***Abdul Basit alias Raju and others vs. Mohd. Abdul Kadir Chaudhary and another (2014)10 SCC*** considered all its earlier judgments on the issue and pointed out distinction between review/recall of order granting bail from cancellation of bail order and have held that the Court granting bail cannot review its order on the ground of it being illegal, unjustified or perverse in view of express bar contained in Section 362 of the Cr.P.C. and held in paragraphs 20, 21, 26 and 27 of the report as under.

20. In the instant case, the respondents herein had filed the criminal miscellaneous petition before the High Court seeking cancellation of bail on grounds that the bail was obtained by the petitioner herein by gross misrepresentation of facts, misleading the court and indulging in fraud. Thus, the petition challenged the legality of the grant of bail and required the bail order to be set aside on ground of it being perverse in law. Such determination would entail eventual cancellation of bail. The circumstances brought on record did not reflect any situation whether the bail was misused

by the petitioner-accused. Therefore, the High Court could not have entertained the said petition and cancelled the bail on ground of it being perverse in law.

21. It is an accepted principle of law that when a matter has been finally disposed of by a court, the court is, in the absence of a direct statutory provision, functus officio and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order granting bail cannot be reviewed by the court passing such judgment and order in the absence of any express provision in the Code for the same. Section 362 of the Code operates as a bar to any alteration or review of the cases disposed of by the court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the Court.

26. In the instant case, the order for bail in the bail application preferred by the accused-petitioners herein finally disposed of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Code, the High Court becomes functus officio and Section 362 of the code applies herein barring the review of judgment and order of the Court granting bail to the petitioner-accused. Even though the cancellation of bail rides on the satisfaction and discretion of the court under Section 439(2) of the Code. It does not vest the power of review in the court which granted bail. Even in the light of fact of misrepresentation by the petitioner-accused during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition.

27. Herein, the High Court has assigned an erroneous interpretation to the well settled position of law, assumed expanded jurisdiction into itself and passed an order in contravention of Section 362 of the code cancelling the bail granted to the petitioners herein. Therefore, in our considered opinion, the High Court is not justified in reviewing its earlier order of grant of bail and thus, the impugned judgment and order requires to be set aside.

9. Facts with the aforesaid situation as has been laid by their Lordships of the Apex Court in the abovementioned judgment is not the scope and jurisdiction of this Court, because such alleged illegality, perversity cannot be determined by this Court in the present application filed under Section 439 (2) Cr.P.C.

10. In view of the above, it is seen that the respondent No.2 is in bail and no instance of misuse of bail has been brought to the notice of this Court, therefore this Court is not inclined to direct the respondent No.2 to be taken back into custody because at present his custodial detention is not warranted. Hence, this petition for cancellation of bail of the respondent No.2 stands dismissed.

It is further clarified that the trial Court shall decide the case on its own merits after analyzing the evidence that is brought on record during trial.

Sd/-
(Rajani Dubey)
Judge