

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO. 704 OF 2020**

1. Parvatabai Babasaheb Gangurde,  
Age : 55 years, Occu. Household
2. Savita @ Sarita Rajendra Gangurde,  
Age : 30 years, Occu. Household

Both R/o Nipani Wadgaon,  
Tq. Shrirampur, Dist. Ahmednagar

**PETITIONERS**

**VERSUS**

1. The State of Maharashtra,  
through the Police Inspector,  
Shrirampur City Police Station,  
Tq. Shrirampur, Dist. Ahmednagar
2. Haushiram Gawaliram Salve,  
Age : Major, Occu. Labour,  
R/o Late Wasti, Nipani Wadgaon Shivar,  
Shrirampur, Tq. Shrirampur,  
Dist. Ahmednagar

**RESPONDENTS**

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Mr. Sachin Deshmukh, Advocate holding for Mr. Majit S. Shaikh,  
Advocate for the petitioners  
Mr. S.R. Yadav, A.P.P. for the respondent/State  
Mr. Shaikh Mazhar A. Jahagirdar, Advocate for respondent No.2

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**CORAM : MANGESH S. PATIL, J.**

**JUDGMENT RESERVED ON : 09.09.2020**  
**JUDGMENT PRONOUNCED ON : 18.09.2020**

**JUDGMENT :**

Heard.

2. Rule. The Rule is made returnable forthwith. With consent of both the sides, the matter is heard finally at the stage of admission.

3. Stated in brief, the facts leading to the filing of this Writ Petition, invoking the powers of this Court under Articles 226 and 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure (“Code”, for short), are to the effect that Crime No.950/2020 was registered with Shrirampur City Police Station, for the offences punishable under Sections 143, 147, 148, 149, 302, 323, 324, 337, 504, 506 of the Indian Penal Code and for the offence punishable under Section 25 read with Sections 3 and 7 of the Arms Act, on 24.05.2020. The petitioners were also roped in as accused and were arrested on 24.05.2020. On that day, when they were produced before the Magistrate, he remanded them to magisterial custody. They filed an application seeking bail purportedly in view of the first proviso to Section 437 of the Code, being women. After soliciting say from the prosecutor, by the order passed on 02.06.2020, the learned Magistrate granted bail to the petitioners subject to usual terms and conditions. Being aggrieved and dissatisfied with such release of the petitioners on bail, the original informant filed Criminal Misc. Application No.107/2020 in the Sessions Court at Shrirampur seeking cancellation of the bail, invoking the

powers of the Sessions Court under Section 439 of the Code. By the impugned order dated 21.07.2020, the learned Additional Sessions Judge allowed the Application and cancelled the bail. Hence this Writ Petition.

4. Mr. Deshmukh, learned Advocate for the petitioners submits that once the discretion was exercised by the Magistrate while granting bail by invoking powers conferred upon him by the first proviso to Section 437 (1) of the Code and which was exercised judiciously, there being no perversity or arbitrariness, the learned Additional Sessions Judge ought not to have cancelled the bail. He would submit that there cannot be any dispute that a Magistrate does have a power under that provision to grant bail even when the offence is punishable with death or imprisonment for life. Therefore, there was no dispute regarding exercise of the jurisdiction by the Magistrate. Petitioner No.1 was aged and petitioner No.2 was having a suckling child and they being women, the Magistrate had exercised the power judiciously. The learned Advocate further pointed out that apart from being women having special difficulties mentioned above, even the role attributed to them is limited, the deceased was shot at by another accused and only presence with some sticks was attributed to the petitioners. Since the dispute arose out of the immovable property, mere presence at the scene, assuming for the sake of convenience that it was the case, is not sufficient to draw any inference as to sharing of common intention or a common object. There were reasonable grounds for the Magistrate for believing that the petitioners

were not guilty and the Magistrate was right in granting bail to them, which is a normal rule and not an exception.

5. Mr. Deshmukh, learned Advocate then submits that there are no allegations about the petitioners having committed breach of the terms and conditions subject to which they have been granted bail and therefore, there was no ground or reason for the learned Additional Sessions Judge to invoke the powers under sub-section (2) of Section 439 of the Code.

6. Lastly, the learned Advocate submitted that the law as to the circumstances or grounds on which a bail can be cancelled has been repeatedly laid down by the Supreme Court. He would cite the decisions of the Supreme Court in the cases of *Gurcharan Singh and others V State (Delhi Administration); (1978) 1 SCC 118*, *Prahlad Singh Bhati V. N.C.T. Delhi and others ; AIR 2001 SC 1444* and the decision of this Court in the case of *Jyoti Kaur Kohli V. State of Maharashtra; 2014(3) BomCR (Cri) 116*.

7. Per contra, Mr. Jahagirdar, learned Advocate for respondent No.2, who is the original informant, strongly supported the impugned order. He submitted that though there cannot be any dispute that a Magistrate does have a power to grant bail even in cases where the offence is punishable upto death or imprisonment for life, may be in exceptional cases where the accused are less than 16 years of age or are women or infirm, that does not obviate a scrutiny contemplated under sub-section (1) of Section 437 of the

Code. He would submit that even when the women can apply under the first proviso, they cannot be released if there appear reasonable grounds for believing that they have been guilty of the offence punishable with death or imprisonment for life. He would submit that though the proviso creates an exception to the category of persons, who can be granted bail by a Magistrate even when the offence is punishable with death or life imprisonment, the Magistrate is expected to exercise the power judiciously by undertaking a scrutiny as to if simultaneously there appear reasonable grounds for believing that the woman is guilty of the crime. In the matter in hand, the learned Magistrate had not undertaken any such scrutiny and straightway readily accepted the request of the petitioners. The reasoning given by the Magistrate only shows that primarily, the claim of the petitioners of being women, one being old aged lady suffering from cough and breathing problem and the other being a woman having suckling child, seems to have weighed with the Magistrate. He did not venture into even a superficial scrutiny as to the role attributed to them and the facts and circumstances in which the offence is alleged to have been committed. He would submit that the powers to grant bail were not exercised by the Magistrate judiciously. Besides, petitioner No.1 was merely suffering from cough and is not even aged 60 years and the child of petitioner No.2 was aged more than two years and he could not have been a suckling child. Therefore, even factually, the grounds being relied upon by the learned Magistrate were not sustainable and still, he exercised the discretion in granting bail even while the investigation was in

progress and number of accused were still at large. It is in view of such peculiar state-of-affairs that the learned Additional Sessions Judge has correctly invoked the powers under sub-section (2) of Section 439 of the Code in cancelling the bail. He would submit that it is trite that it is not that it is only in the event of some supervening circumstances that bail can be cancelled but that provision confers upon the Sessions Court a power to cancel the bail even on merits. Therefore, the order passed by the Magistrate was clearly arbitrary, perverse and capricious and has been rightly interfered to and reversed by the Additional Sessions Judge.

8. The learned A.P.P. also subscribed to the arguments advanced by the learned Advocate for respondent No.2.

9. I have carefully gone through the papers. As can be gathered, the incident had taken place on 23.05.2020, the FIR was lodged on 24.05.2020, the petitioners were arrested on 24.05.2020 and on 02.06.2020, they were taken in magisterial custody and the Magistrate accepted their request for bail.

10. There cannot be any dispute as to the legal position. Section 437 of the Code provides the circumstances when a person accused of or suspected of commission of a non-bailable offence/s can be granted bail by a Court other than High Court or Court of Session. Clause (i) of sub-section (1) of Section 437 clearly lays down that while exercising this power, a

person accused of committing an offence punishable with death or imprisonment for life, when there appears reasonable ground/s of believing that he has been guilty of that crime, cannot be released on bail. However, by virtue of the first proviso, a person covered by clause (i) or (ii) can be released on bail if such a person is under the age of 16 years or is a woman or is sick or infirm. A plain reading of these provisions would clearly indicate that a Magistrate does have jurisdiction to grant bail but he has to undertake a scrutiny to ascertain if a person brought before him can be believed to be guilty of an offence punishable with death or imprisonment for life. If he comes to such a conclusion, he does not get jurisdiction to grant bail. However, by virtue of the proviso, he can exercise such power in case of special persons like a person aged less than 16 years, or woman or a sick or infirm. It does not mean that even when such persons apply for bail before a Magistrate, he would automatically get a jurisdiction and avoid any scrutiny as is required by clause (i) of sub-section (1) of ascertaining if there exists reasonable grounds for believing that such a person has been guilty of the offence punishable with death or imprisonment for life.

11. One can gainfully refer to and rely upon the following observations of the Supreme Court in the case of ***Prahlad Singh Bhati*** (supra) :-

*“Chapter XXXIII relates to the provisions as to bails and bonds. Section 436 provides that when any person accused of a bailable offence is arrested or detained without warrant by an officer*

*incharge of the police station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail. Under Section 437 of the Code when a person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail by a court other than the High Court and Sessions subject to the conditions that he does not reasonably appear to have been guilty of an offence punishable with death or imprisonment for life. The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed. It does not, however, mean that persons specified in the first proviso to sub-section (1) of Section 437 should necessarily be released on bail. The proviso is an enabling provision which confers jurisdiction upon a court, other than the High Court and the court of Sessions, to release a person on bail despite the fact that there appears reasonable ground for believing that such person has been guilty of an offence punishable with death or imprisonment for life. There is no gainsaying that the discretion conferred by the Code has to be exercised judicially. Section 438 of the Code empowers the High Court and the Court of Sessions to grant anticipatory bail to a person who apprehends his arrest, subject to the conditions specified under sub-section (2) thereof.”*

*“Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a court of Sessions yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is, suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negotiate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death*

or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.” (Emphasis supplied)

12. This is precisely where the learned Magistrate had committed a mistake in exercising the jurisdiction without addressing the fetters put on his powers by the Legislature by virtue of clause (i) of sub-section (1) of Section 437. He simply referred to the fact of petitioners being women, petitioner No.1 being aged lady and suffering from cough and petitioner No.2 having a suckling child. More importantly, he also failed to notice the fact that petitioner No.1, even according to her own version, is aged 55 years and going by the date of birth of the child of petitioner No.2, he could not have been a suckling child. Both these facts were noticed by the learned Additional Sessions Judge while concluding that the Magistrate had indeed exercised the jurisdiction unmindful of the limitations on his powers. The learned Additional Sessions Judge has thus rightly concluded that the order passed by the Magistrate was not sustainable in law and on facts and the jurisdiction exercised by him was injudicious.

13. It is trite as has been laid down in the case of ***Kanwar Singh Meena Vs. State of Rajasthan & Anr. ; (2012) 12 SCC 180***, it is not that it is only when there exists some supervening circumstances that a bail can be cancelled by invoking powers under sub-section (2) of Section 439 of the Code. That power can also be exercised when the order passed by a Magistrate granting bail is not sustainable on merits. The present case clearly

falls under the second category. I, therefore, find no perversity, arbitrariness or capriciousness in the order passed by the learned Additional Sessions Judge in invoking that power.

14. In the normal course, this should have been the end of the matter. However, there are important facts and the subsequent happenings which compel me to adopt a slightly different approach. Admittedly, in due course of time, the chargesheet has been filed which obviously means that the Investigating Officer has been able to complete the investigation even while the petitioners have been on bail. When the petitioners are already on bail and there are no allegations about them having committed breach of the terms and conditions subject to which they were granted bail, it would not be appropriate to straightway issue any direction to them to surrender before the Investigating Officer. In the peculiar facts and circumstances, it would be just and proper that even if the Writ Petition is being dismissed, the petitioners are granted some breathing time to enable them to apply for regular bail since the chargesheet has already been filed and the Session Court would be in a better position to decide their application for bail.

15. In the result, the Writ Petition is dismissed. The interim relief granted by this Court vide order dated 27.07.2020 is extended by two weeks from today, with a view to enable the petitioners to apply for regular bail before the Sessions Court where the chargesheet has been filed.

16. The Rule is discharged.

**[MANGESH S. PATIL]**  
**JUDGE**

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