

22.07.2021
Court No.30
Item No.03 & 04
Avijit Mitra

CRR 375 of 2021 [Court on its Motion]
In
CRM 8480 of 2020
In re: Bablu Sk. @ Saddam Hossain... Petitioner
And
CRM 317 of 2021
In re: Diken Sk. ... Petitioner
(Via video Conference)

Mr. Kallol Mondal

For the Petitioner in CRM 8480 of 2020

Mr. Golam Mostafa
Mr. Samirul Sardar

For the Petitioner in CRM 317 of 2021

Mr. S. G. Mukherjee, Id. P.P.
Mr. Binay Panda
Mrs. Puspita Saha

For the State in both matters

One, Bablu Sk. alias Saddam Hossain (in short, Bablu) preferred an application under Section 439 of the Code of Criminal Procedure, 1973 (in short, the Code) being CRM 8480 of 2020 in connection with Berhampore Police Station Case No. 418 of 2020 dated 17/05/20 u/s. 22(C)/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (in short, NDPS Act). The said application was allowed by an order dated 21st October, 2020. Thereafter, one, Diken Sk. (in short, Diken) involved in the self-same Berhampore Police Station Case No. 418 of 2020 dated 17/05/20 preferred an application under section 439 of the Code being CRM No. 317 of 2020 on the ground of parity with Bablu. The said application was heard on 4th February, 2021 when a coordinate bench of this Court on a *prima facie* finding that

bail had been granted to Bablu contrary to records, issued Rule with direction upon the department to serve the same upon Bablu. The said Rule was registered as CRR 375 of 2021. Thereafter, by an order dated 12th March, 2021, Mr. Mondol, learned advocate for the State Legal Services Authority was engaged to represent Bablu. Upon such engagement, written argument was submitted on behalf of Bablu.

Mr. Mostafa, learned advocate appearing for the petitioner in CRM No. 317 of 2021 submits that Diken is a young man aged about 23 years and he has been falsely implicated. He is languishing in custody since 7th May, 2021 though Bablu, who is similarly situated with Diken, had been enlarged on bail by a coordinate bench of this Court on 21st October, 2020. Accordingly, on the ground of parity, Diken may be enlarged on bail.

Mr. Mondol, learned advocate appearing for Bablu submits that upon considering the submissions of the parties and the materials on record, a coordinate bench of this Court enlarged Bablu on bail by an order dated 21st October, 2020. The said order cannot be cancelled by this coordinate bench as Bablu had not misused his liberty. No adverse fact has surfaced after Bablu was granted bail and no supervening circumstances warrant such cancellation. In support of such contention, reliance has been placed upon the judgments

delivered in the case of ***Ranjit Singh versus State of Madhya Pradesh***, reported in ***(2013) 16 SCC 797*** and in the case of ***Abdul Basit @ Raju versus Mohd. Abdul Kadir Chaudhary and Anr.***, reported in ***(2014) 10 SCC 754***.

Mr. Mondol argues that Section 362 of the Code operates as a bar to any alteration or review of the case except any clerical or arithmetical error by the Court. Even if the observations in the order granting bail are controverted on the basis of existing factual matrix, the order of a coordinate bench of this Court needs to be assailed before the Hon'ble Supreme Court.

Per contra, Mr. Mukherjee, learned Public Prosecutor, appearing for the State argues that this Court does have the power under Section 439(2) of the Code to set aside an unjustified, illegal or perverse order granting bail. The order dated 21st October, 2020 has been passed upon misconstruing the actual facts on record. Such an order is a nullity and can always be recalled and the provisions of Section 362 would not operate. The power of recall is different from the power of review. Reliance has been placed upon judgments delivered in the case of ***State of Punjab –vs- Davinder Pal Singh Bhullar and others***, reported in ***2011 (14) SCC 770*** and in the case of ***New India Assurance Company Limited –vs- Krishna Kumar Pandey***, reported in ***2019 SCC Online SC 1786***.

He argues that the judgments cited by Mr. Mondol are

distinguishable on facts. The present case is under NDPS Act which has been promulgated to combat the menace of crimes relatable to drugs and psychotropic substances. The rigors of Section 37 of the NDPS Act would have to be rebutted before an accused may be enlarged on bail. A perusal of the order dated 21st October, 2002¹ would reveal that the same had been passed on the rudiments of the findings/observations that *'although the name of the petitioner is reflected in the seizure list, he was not arrested at the spot'* and *'as it is contended that the petitioner had fled from the spot'* and that Bablu's complicity in the alleged crime *'appears to have transpired from the statement of co-accused before police officer'*. Such findings/observations are absolutely contrary to the materials on record since both Bablu and Diken were arrested at the spot and contraband substances above commercial quantity was recovered from their possession. In view thereof, this Court *suo moto* issued rule upon Bablu. On the basis of the materials on record neither Bablu nor Diken is entitled to be enlarged on bail and two different orders cannot be passed by this Court.

He further argues that power under section 439(2) is a special provision in the Code which overrides Section 362. The inherent jurisdiction of this court under Section 482 needs to be exercised to cancel a bail order passed on erroneous appreciation of facts. The High Court can certainly interfere when the order is palpably unjustified. In support of

such contention he has placed reliance upon a judgment delivered in the case of in re: **Anwar Hossain Fakir** reported in **(2016) SCC OnLine Cal 6176** and in the case of **Puran – Vs- Ram Bilas and another**, reported in **2001 (6) SCC 338**.

The materials in the case diary clearly disclose that contraband substance above commercial quantity was recovered from both Bablu and Diken and they were arrested at the spot. The order dated 21st October, 2020 has been passed upon misconstruing the actual facts on record. On the basis of the self- same records, it would be an absurdity to suggest that the Court should retain the order granting bail to Bablu and reject Diken's prayer for bail.

In the case of **Prakash Kadam Versus Ramprasad Vishwanath Gupta**, reported in **2011 (4) Supreme 197** it has *inter alia* been observed that '*in considering whether to cancel the bail the Court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him*'.

It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgments delivered in the case of **Ranjit Singh** (Supra) and **Abdul Basit** (Supra) are not pertaining to NDPS Act and are

distinguishable on facts.

The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail. There is no absolute bar towards cancellation of bail by a coordinate bench. However, such power needs to be exercised sparingly. The object underlying cancellation of bail is to protect fair trial and to secure justice. Under Section 37 of the NDPS Act, notwithstanding anything contained in the Code, the Court has to arrive at a finding that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail. Thus while exercising statutory power under Section 439(2) of the Code, the Court is bound to act within the four corners of the Code and the NDPS Act. In the present cases, contraband substance above commercial quantity was recovered from Bablu and Diken and they were arrested at the spot. It is not a case that Bablu's name has transpired on the basis of a co-accused statement before a police officer. Both of them are clearly involved in the offence and the rigors of Section 37 of the NDPS Act are attracted.

For the reasons discussed above, we cancel the bail granted to Bablu and direct him to surrender forthwith before the Learned Special Court. In case Bablu does not surrender within a period of three weeks from date, the learned Special Court will be at liberty to issue non-bailable warrant of arrest and subsequently on receipt of report of execution, issue

proclamation against him. The CRR 375 of 2021 is, accordingly, disposed of.

In view thereof, we are also not inclined to exercise discretion in favour of Diken, who has prayed for bail on the ground of parity with Bablu. The application being CRM No. 317 of 2021 is, accordingly, dismissed at this stage.

The case diary is returned to Mr. Mukherjee, learned Public Prosecutor.

The learned Registrar (Judicial Service) of this Court is directed to communicate this order to the learned Court below immediately.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Suvra Ghosh, J.)

(Tapabrata Chakraborty, J.)