

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO. 152 OF 2019

Krushna S/o. Vishwasrao Hiwale
Age 35 years, Occ. Agriculture
R/o Ambegaon, Post Tembhurni
Tq. Jafrabad, Dist. Jalna.

.. APPLICANT

VERSUS

1] The State of Maharashtra
2] Madhukar s/o. Namdeo Dethe. **..RESPONDENTS.**

. . .

Mr. Sudarshan J. Salunke, Advocate for applicant
Mr. S.B. Narwade, APP for respondent No.1
Mr. Yogesh G. Somani, Advocate for respondent No.2.

CORAM : PRAKASH D. NAIK J.

**RESERVED ON : 26th NOVEMBER, 2021.
PRONOUNCED ON 21st DECEMBER, 2021.**

ORAL ORDER :

1] The applicant is the original complainant in Crime No. 323 of 2019 registered with Sadar Bazar Police station, Jalna for the offences punishable under Sections 307, 324, 323 343, 143, 147, 148 and 149 of IPC.

2] The applicant has preferred this application under section 439(2) of the Cr.P.C. seeking cancellation of anticipatory bail granted to respondent No.2 by order dated 3.8.2019 passed by Additional Sessions Judge, Jalna.

3] The FIR was registered on 10.6.2019 by Krishna Vishwasrao Hiwale (applicant). It is alleged that on 8.6.2019 while

the complainant was performing agricultural work on account of the property dispute Sheshrao Hiwale had assaulted the uncle of complainant - Santosh Gangaram Hiwale. He had sustained injuries on his head. The complaint was lodged with Tembhurni police station. The injured was sent to hospital for C.T.-Scan and MRI. The complainant and his uncle Shivaji Hiwale had accompanied Santosh Hiwale. At about 8.00 on clock, the complainant and his uncle came near Jalna bus stand. While they were removing their motorcycle from parking space, they saw the vehicle of respondent No.2. About 5-6 persons including respondent No.2 were staring at complainant. The complainant and his cousin proceeded towards the village on motorcycle. The accused were chasing them. While they reached at Petrol Pump, the accused tried to run over them. To avoid the attack, they proceeded towards the road leading to Bhavani Gayatri Nagar. The accused approached them. Madhukar Dethe, Ashok Hiwale, Dnyandeo Hiwale, Sheshrao Hiwale, Parmeshwar Hiwale, Rameshwar Hiwale, Dnyaneshwar Hiwale and other 3 unknown persons alighted from the vehicle. They were armed with iron rod and sticks. They assaulted the complainant and his cousin with intention to kill them. The complainant was assaulted on his head and legs whereas his cousin Shivaji was assaulted on head, face and thigh by iron rod and wooden log.

4] The respondent No.2 applied for anticipatory bail before the Court of Sessions at Jalna. The application was rejected by order dated 15.7.2019. The respondent No.2 preferred another application before the Sessions Court, Jalna. The said application was allowed by order dated 3rd August, 2019.

5] The learned counsel for the applicant submitted that the impugned order dated 3rd August, 2019 is illegal. It has to be set aside. Although the application for anticipatory bail preferred by the

applicant was rejected by order dated 19.7.2019, the subsequent application was allowed by order dated 3rd August, 2019. Both the application were decided by the same court. There was no change in circumstances to reconsider the prayer for anticipatory bail. The first application was rejected on merits and there was no occasion for the learned Judge to entertain the second application within a short span of time without there being any change in circumstances. The second application was not maintainable. The offence is of serious nature. Custodial interrogation of the respondent No.2 was necessary. Medical certificates supports the version of the complainant. The injured persons were admitted in hospital for treatment for long time. The injured had sustained severe injuries. The co-accused had assaulted uncle of applicant on 9.6.2019. The father of respondent No.2 had assaulted the uncle of the applicant. The FIR was registered on 1.7.2019. Hence, the order granting anticipatory bail be set aside.

6] The learned Advocate for the applicant has relied upon the decision of the Apex Court in the case of ***Kanwar Singh Meena vs. State of Rajasthan and another***” AIR 2013 SC 206; and ***State of Maharashtra vs. Captain Bhddhikota Subha Rao***” 1989 Supp(2)SCC 605.

7] The learned counsel for respondent No.2 has submitted that there is change in circumstance. The successive application for anticipatory bail is maintainable. The learned Judge has assigned cogent reasons for allowing the application for anticipatory bail. On account of enmity, false FIR has been registered against the accused. The first application was rejected on the ground that the vehicle was required to be recovered. Second application was allowed on the ground that the vehicle is already recovered. The injured has taken treatment in private hospital. Injuries are not

serious. Section 307 of IPC is not attracted. The investigation is completed and charge sheet is filed. The question of granting custodial interrogation at this stage does not arise. The status report of the proceeding before the trial court indicate that the case of due for framing charge.

8] The learned counsel for respondent No.2 relied upon the decision of the Apex Court in the case of ***Shubhendu Mishra Vs. Subrat Kumar Mishra reported in AIR 1999 SC 3026*** and the decision of this court in the case of ***Joseph Paul Vs. Shelly Dhall Sanjesh reported in 2008 All M.R. (Cri.) 1010.***

9] The learned App supported the submissions of the advocate for the applicant. It is submitted that the investigation has been completed and the charge sheet is filed. However, the order is required to be set aside since it is an illegal order. There was no ground for entertaining the second application for anticipatory bail. Specific role was attributed to respondent No.2. Both the injured had suffered injuries. There is enmity between both the sides. The order granting anticipatory bail may be set aside.

10] In the case of ***“State of Maharashtra vs. Captain Buddhikota Subha Rao” (supra)*** the Apex Court had observed that the order wherein bail was granted without substantial change in fact situation is not sustainable. In the said case, successive bail applications were rejected on merits. It was observed that once the application was rejected, there was no question of granting similar prayer over-ruling earlier decision without there being a change in fact situation. Between the two orders, there was a gap of only two days and it was nobody’s case that during these two days, drastic changes had taken place necessitating the release of the accused on bail. It was also observed that judicial discipline will have to be

sacrificed at the alter of judicial discretion if the court refuses to exercise jurisdiction under Article 136 of the Constitution of India.

11] In the case of **Kanwar Singh Meena Vs. State of Rajasthan** (supra) the Apex Court had observed that Section 439 confers very wide powers on the High Court and Court of Sessions regarding bail. While granting bail, the High Court and the Sessions Court are guided by the same considerations as other courts i.e. Gravity of crime, character of evidence, position and status of accused with reference to victim and witnesses, the likelihood of accused fleeing from justice and repeating the offence, the possibility of tampering with the witnesses and obstructing the course of justice. It is further observed that while cancelling bail under section 439 (2), the primary considerations which weigh with the court are, whether the accused is likely to tamper with evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. The High Court or the Sessions Court can cancel bail even in case where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court ignores relevant material while granting bail or considers irrelevant material which has no relevance with the question of grant of bail to the accused, the bail can be cancelled.

12] In the case of **Shubhendu Mishra Vs. Subrat Kumar Mishra** (supra) the Honourable Apex Court has referred to the decision in the case of **Daulatram vs. Haryana (1995) 1 SCC 399**, wherein, distinction was drawn between the rejection of bail in a non-bailable case at the initial stage and cancellation of bail already granted. Reference is made to the observations in the aforesaid decision, wherein, it was held that very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail already granted. Generally, the grounds for

cancellation of bail broadly (illustrative not exhaustive) are interference or attempt to evade the due course of justice or abuse of concession granted to the accused in any manner, the satisfaction of court on the basis of material placed on record and the possibility of accused absconding. Bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstance have rendered it no longer conducive to a fair trial to allow the applicant to retain his freedom by enjoying concession of bail during the trial. Those principles were lost sight of by the High Court who had decided to cancel the bail already granted. The High Court overlooked the distinction of the factors relevant for rejecting bail and cancelling bail already granted. After interpreting the observations in the case of Daulatram (supra), the Court observed that these principles appear to have been totally lost sight of by the High court while cancelling bail. The court overlooked the distinction of the factors while cancelling bail of the appellant in a rather mechanical manner. The order of the High Court is not sustainable.

13] In the case of Joseph Paul (supra) this court has observed that successive application for anticipatory bail is maintainable if there is change in circumstances. In the said case, the order granting bail was challenged before the High Court. One of the ground was that, successive anticipatory bail application filed by the accused before the lower court was not maintainable and the order allowing the application has to be set aside. In para. 9 of the said decision, it was observed that the aspect about maintainability of successive application was dealt with by the High Court in case of Devidas Raghunath Naik vs. State. The Court after considering the relevant decision, had taken a view that parameters which govern the question of maintaining successive bail application under section 439 of Cr.P.C. will apply with same force to the application for anticipatory bail under section 438 of Cr.P.C. Statement of law

occurring in the said reported decision is unexceptionable. The court further observed that change in circumstance had been made out in the application, as it can be discerned from the observations of the court and no fault can be found with the approach of the court.

14] Turning to the facts of this case, it appears that there is dispute between both the sides on account of agricultural property. They are at logger-head. The respondent No.2 preferred application for anticipatory bail apprehending arrest in crime No. 323 of 2019. The application was preferred on 10.7.2019. The application was rejected by order dated 15.7.2019. While rejecting the said application, it was observed that the respondent No.2 accused is not denying that the car does not belong to him. The respondent No.2 had preferred second application, which was also listed before the same learned judge. In the said application, it was disclosed that the previous application was rejected. The objection raised by the prosecution was that the vehicle was not recovered from the accused/respondent No.2. Now, the vehicle has been recovered. Nothing is to be recovered. The medical evidence does not correspond the allegations in the FIR. The injured have suffered minor injuries. They are discharged from the hospital. Offence under section 307 of IPC is not made out. The circumstances that investigation would not proceed without arresting applicant/respondent No.2 does not exist. The said application was filed on 31.7.2019. The application was allowed by order dated 3rd August, 2019.

15] While allowing the said application, it was observed that the previous application was rejected on the ground that the vehicle was to be recovered. Now, the vehicle has been recovered. There is no cogent evidence to show that the vehicle had touched any person or that the respondent No.2 was driving the vehicle. Recovery of

vehicle is a change in circumstance. The accused is entitled for anticipatory bail. Respondent No.2 was directed to report I.O. and cooperate with the investigation. He was also directed not to put pressure directly or indirectly on any witnesses connected with the case. He shall not interfere in the investigation. Till the investigation is complete, he shall not leave to jurisdiction of District Jalna without permission of the court. The conditions were kept in operation for a period of 60 days.

16] The respondent No.2 has filed affidavit in reply and contended that the application is motivated. There is a civil dispute between the brothers inter-se. The respondent No.2 is son in law of accused Ashok Hiwale. The complainant wants to keep the entire family behind bars. No specific role was attributed to respondent No.2. He was not involved in assaulting the complainant. There was change in circumstance. On completing investigation, I.O. has filed charge sheet in the case and the case is committed to the court of sessions and the same is numbered as SCC No. 68 of 2020. It was due for framing charge. There is no complaint against respondent NO.2 that he had jumped the bail. He is the Sarpanch of village since last 10 years. He belongs to the rival group.

17] On perusal of the orders passed by the learned Sessions Judge, it can be seen that the application was decided by the same Judge. While allowing the second application for anticipatory bail, the court was alive to the fact that his previous application has been rejected. The court has also noted that there is change in circumstances. The second order has not been passed mechanically. Reasons are assigned for allowing the second application. In the event of change in circumstances, second application is maintainable in law. The learned Judge has noted the change in circumstance to entertain the application. The impugned order was

passed on 3.8.2019. Stringent conditions were imposed while allowing the application for anticipatory bail. The investigation is complete and charge sheet has been filed. The respondent No.2 has contended that the case is committed to the court of sessions. The status report relating to the case shows that it is pending in the court of District and Sessions Judge, Jalna for framing charge. In these circumstances, no case is made out for exercising powers under section 439(2) of Cr.P.C. for cancellation of anticipatory bail granted to respondent No.2 about two years ago. Hence I pass the following order :

O R D E R

ACB NO. 152 of 2019 stands rejected.

**[PRAKASH D. NAIK]
JUDGE**

GRT/-