

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (MAIN) NO. 292 OF 2019

Union of India, Thr. Haresh S.
Gangan, Intelligence Officer Appellant
Versus
Rishi Raj Jaiswal Respondent

Mr. Mahesh Amonkar, Central Government Standing Counsel
for the Appellant.

Mr. Kamalakant Poulekar, Advocate for the Respondent.

Coram:- M.S. JAWALKAR, J.

Reserved on:- 1st March 2021.

Pronounced on:- 17th March 2021.

ORDER:

Heard Mr. Mahesh Amonkar, the learned Central
Government Standing Counsel for the appellant and Mr.
Kamalakant Poulekar, the learned Counsel for the respondent.

2. This is an application under Section 439 of the
Criminal Procedure Code, 1973 (Cr.P.C.) for cancellation of
bail granted to the respondent by the Adhoc District Judge-I
and Sessions Judge, Fast Track Court at Mapusa in NDPS
Case No. 8/2017 by order dated 03.11.2018.

3. The applicant stated that on 15.11.2016 the Intelligence Officers of NCB, Sub-Zone Goa conducted a house search at House No. 810, Anjuna, Bardez, North Goa, Goa, where the respondent was present and during the search, the NCB team recovered and seized contraband items from the above mentioned house. The applicant states that on recovery of the contraband items, the respondent voluntarily accepted that all the items belong to him and further his voluntary statement is recorded under Section 67 of NDPS Act accepting that the contraband items belonged to the respondent and that these items are used for the purpose of selling them to different customers. It is stated that the respondent was arrested on 05.11.2016 at 11:45 p.m. for the offence punishable under Section 8(c), 21(b) and 22(c) of the NDPS Act. After the investigation was completed, the offence came to be registered under No. NDPS/8/2017 against the respondent before the Court of Additional Sessions Judge at Mapusa.

4. It is submitted by the learned Additional Public Prosecutor that the learned Additional Sessions Judge (FTC)

at Mapusa after hearing the respondent vide order dated 03.11.2018 was pleased to allow the bail application on the ground that complainant/I.O. is one and the same person and relying on the ratio laid down by the Hon'ble Apex Court in the case of **Mohan Lal Vs. State of Punjab, 2018 AIR SC 3853** and on relying on the decision of the Principal Seat of this Court in the case of **Arif Khan @ Agfha Khan Vs. State of Uttarakhand** (Criminal Appeal No. 272/2007) and as such, the respondent was released on bail.

5. It is further submitted by the learned Additional Public Prosecutor that the seized contraband is of commercial quantity and as such, the ratio in the case of **Mohan Lal** (supra) is not applicable to the present case. It is submitted that the learned Judge ought to have considered that the contraband items involved in the present case was of commercial quantity and therefore, in view of Section 37 of the NDPS Act, the Court could not have granted bail to the respondent. In view thereof, he prays that the impugned order dated 03.11.2018 granting bail to the respondent be quashed and set aside.

6. The learned Counsel for the respondent/accused, Mr. Kamalakant Poulekar submitted that the application is not maintainable under Section 439 of Cr.P.C. Bail can be cancelled only if conditions of the bail are violated. There are no such averments in the application that there is any violation of the conditions by the respondent. He relied on various judgments in support of his contention that when circumstances brought on record did not reflect any situation where bail was misused by the accused, the bail granted cannot be cancelled. He also relied on the decision of the Hon'ble Apex Court in the case of **Abdul Basit Vs. Abdul Kadir Choudhary, (2014) 10 SCC 754** and the orders of this Court in **State Vs. Ms. Svetlana Federova** (CRMAM No. 97/2019 dated 21.06.2019) and in **State Vs. Mr. Caitan Fernandes** (CRMAM No. 182/2019 dated 17.09.2019).

7. Heard Mr. Mahesh Amonkar, the learned Central Government Standing Counsel for the applicant and Mr. Kamalakant Poulekar, the learned Counsel for the respondent, at length.

8. It appears that the bail was granted to the accused on 03.11.2018, on the ground that the complainant and the I.O. is one and the same person and the same being in violation of the ratio laid down in **Mohan Lal's** case (supra). It appears that since then, there is no complaint by the prosecution of any violation of the bail conditions. The 5 Judges Bench of the Hon'ble Apex Court in **Mukesh Singh Vs. State (Narcotic Bench of Delhi), (2020) 10 SCC 120** overruled the decision in **Mohan Lal's** case (supra) and held that the view taken in **Mohan Lal's** case (supra) that the informant cannot be the investigator and in such a case, the accused is entitled to acquittal is not good law.

9. Now the question here is whether the bail granted under Section 439 of Cr.P.C. can be cancelled and withdrawn. Firstly, the prosecution ought to have moved the learned Additional Sessions Judge, who granted the bail. Secondly, the Hon'ble Apex Court in **Abdul Basit's** case (supra) held that where circumstances are brought on record does not reflect any situation where the bail was misused by the petitioner, the High Court cannot entertain such Petition and

cancel the bail on the ground that it being perverse in law. An order granting bail can only be set aside on grounds of being illegal or contrary to law by the Court, superior to the Court, which granted the bail and not by the same Court.

10. Insofar as the decisions of this Court in **Ms. Svetlana Federova** (supra) and **Mr. Caitan Fernandes** (supra) are concerned, in view of the decision of the Hon'ble Apex Court in **Mukesh Singh** (supra), may not be helpful in the present matter. As it appears that since the application is filed under Section 439 of Cr.P.C. for cancellation of bail, the prosecution is required to establish that there is breach of conditions imposed by the Court while granting bail to the accused. Though in **Mohan Lal's** case (supra) to the extent it's view that the informant cannot be the investigator is overruled, but the bail is granted on the basis of the judgment then holding the field, which may not be liable to be set aside under Section 439(ii) of Cr.P.C. There has to be circumstances brought on record to demonstrate that the applicant has misused the bail and there is breach of any of the bail conditions granted in 2018. In the present matter,

except the reason that **Mohan Lal's** decision (supra) is overruled, there are no circumstances expressing breach of bail conditions brought on record. As such, no case is made out for cancellation of bail as required by the law. As such, I do not find any merit in the application filed by the State and the same stands dismissed.

M.S. JAWALKAR, J.

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