

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 358 OF 2020

Firoz Khan @ Abu s/o Ajiz Khan,
Aged about 47 years,
Occupation – Private,
R/o Azad Colony, Bada Tajbagh,
Sakkardara, Nagpur.

.... **PETITIONER**

VERSUS

State of Maharashtra,
through P.S.O., P.S. Sakkardara, NDPS
Cell, Crime Branch, Nagpur.

.... **RESPONDENT**

Mr. A.M. Mardikar, Senior Counsel assisted by Mr. C.D. Rohankar,
Counsel for the petitioner,
Mr. S.S. Doifode, Addl.P.P. for the respondent/State.

CORAM : ROHIT B. DEO, J.
DATED : 21st JANUARY, 2021

ORAL JUDGMENT :

The petitioner is assailing the order dated 29-8-2020 in Miscellaneous Criminal Application 1918/2020 rendered by the learned Additional Sessions Judge-7, Nagpur, the effect of which is that the bail granted to the petitioner by the learned Sessions Judge vide order dated 29-6-2020 rendered in Crime 12/2019 registered with Police Station Sakkardara, Nagpur, is cancelled.

2. The law is well settled. The power of the Court to cancel the bail under Section 439(2) of the Criminal Procedure Code (Code) does not entail or envisage a review on merits.

3. The width and amplitude of the power, available to the same Court to cancel the bail under Section 439(2) of the Code is explained by the Supreme Court in *Abdul Basit Alias Raju and others v. Mohd.*

Abdul Kadir Chaudhary and another, (2014) 10 SCC 754 thus :

*“17. In this context, it is profitable to render reliance upon the decision of this Court in [Puran v. Rambilas](#). In the said case, this Court held (SCC p. 345, para 11) that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In [Narendra K. Amin v. State of Gujarat](#), the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle laid down in *Puran* case has observed that when irrelevant materials have been taken into consideration by the court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate court and that no review would lie under section 362 of the Code. In essence, this Court has opined that if the order of grant of bail is perverse, the same can be set at naught only by the superior court and has left no room*

for a review by the same court.

18. Reverberating the aforesaid principle, this Court in the recent decision in Ranjit Singh v. State of M.P has observed that: (SCC p. 806, para 19)

“19. ... There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court.”

19. Therefore, the concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the aforesaid decisions would present before us that 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.

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 petitioners 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 where the bail was misused by the petitioner-accused. Therefore, the High Court could not have entertained the said petition and cancelled the bail on grounds 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.”

4. The order of cancellation may now be tested on the anvil of the settled legal position.
5. The petitioner is facing prosecution for offences punishable under sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act (NDPS Act).
6. The petitioner was arrested on 19-1-2019 and was released on bail vide order dated 29-6-2020.
7. The prosecution sought cancellation of bail on several grounds, which may now be noted. The first ground was that the petitioner is a hardened criminal with 29 adverse criminal antecedents. The second ground was that before allowing the third application, the learned Sessions Judge had rejected the two applications previously filed. The third ground was that the petitioner withdrew the bail application from the High Court. The other ground was that the petitioner did not

disclose that his application seeking discharge is rejected by the Special Court, Nagpur. The prosecution then contended that the audio/video quality of the virtual hearing was not up to the mark and this resulted in inadvertent error creeping in the order of bail, which is significant in the sense that instead of 59 grams of MD powder, the order granting bail reference to the quantity as 15 grams. It was then contended that while granting bail, some material and relevant facts were not considered.

8. The learned Sessions Judge was persuaded to cancel the bail and was swayed by :

(i) Neither the prosecution nor the accused disclosed that the two previously filed bail applications were rejected by the Sessions Court, and that the third was withdrawn from the High Court.

(ii) The rejection of the discharge application was not disclosed.

(iii) The reply of the prosecution mentioned the crime number incorrectly which led the Court to wrongly mention the quantity of the contraband seized.

9. The learned Sessions Judge observes that the power under Section 439(2) of the Code is a special power which overrides Section

362 of the Code. The learned Sessions Judge further observes that a mistake of the Court, whether due to the Court being misled or fraud being practiced or otherwise, can always be corrected in exercise of inherent power.

10. In my considered view, the order of the learned Sessions Judge is manifestly erroneous, on fact and in law.

11. The assumption of the learned Sessions Judge that the previously filed bail applications were suppressed, is contrary to record. The note to the third application specifically states that the two previous applications were rejected by the learned Sessions Judge and that the third came to be withdrawn from the High Court. The parameters for considering a discharge application are entirely different than the parameters which weigh with the Court in deciding the entitlement to bail, regular or pre-arrest. The fact that the discharge application came to be rejected is hardly a material fact and in any event, no inference could have been drawn of suppression. In my considered view, the learned Sessions Judge seriously erred in holding that the petitioner-accused suppressed facts.

12. The factual premise which is the edifice of the cancellation order

is erroneous and contrary to record, and I, therefore, need make no observations on the assumption of the learned Judge that Section 439(2) of the Code overrides the embargo engrafted in Section 362 of the Code. Neither is it necessary to consider the relevance of the observation of the learned Judge that inherent power is available to correct mistakes, whether actuated by the conduct of the litigant or attributable to the Court.

13. Suffice is to note, that there is no ambiguity as to the settled legal position. Bail cannot be cancelled by the Court which grants bail, on the ground that relevant material was not considered or that the applicant is a history-sheeter. It was open for the prosecution to have approached the High Court seeking cancellation of bail under Section 439(2) of the Code, which the prosecution failed to do. The order of cancellation, virtually entails a review on merits, which is clearly impermissible. The petition is allowed in terms of prayer clauses (i) and (ii), which read thus :

“(i) issue an appropriate writ, order or direction and thereby quash and set aside the order dated 29-8-2020 (Annexure-E) passed in Misc. Criminal Application 1918/2020 by the learned Additional Sessions Judge-7, Nagpur.

(ii) issue an appropriate writ, order or direction and thereby confirm the order dated 29-6-2020 (Annexure-B) passed in Misc. Criminal Application No.1454/2020 passed by

the learned Additional Sessions Judge-7, Nagpur.”

14. Rule is made absolute in the afore-stated terms.

JUDGE

adgokar