

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

**936 APPLICATION FOR CANCELLATION OF BAIL NO.108 OF
2022**

ASHWINI CHETAN KAPOLE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Applicant : Mr. Jain h/f Mr. Thoke Dhananjay B.
APP for Respondent-State : Mr. V. M. Kagne.
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CORAM : S. G. MEHARE, J.
DATE : 26.08.2022

PER COURT :-

1. Heard the learned counsel for the applicant. The applicant has filed an application under Section 439(2) of the Code of Criminal Procedure (Cr.PC. for short) for cancellation of anticipatory bail granted to respondents No.2 to 5.

2. The brief facts of the case are that respondents No.2 to 5 are the developers. The complainant and others have purchased the flats in the scheme launched by respondents No.2 to 5. The sale deed was executed, and the possession was also handed over to the complainant. However, the complainant learnt that the facilities promised in the brochure like common toilets for driver and helper, changing room, cabin for security guards, designer lobby, automatically

operated lift, etc. were not available. The entry gate was also not as per the municipal map. The builder has constructed the shop on the said space and sold it. The carpet area of the flat purchased by the complainant was also less than promised. The area was less by 60 to 90 square feet. Therefore, respondents No.2 to 5 have cheated the complainant and many others. It is the modus operandi of the respondents that they do promise something but give something else. On the report of the applicant, the police have registered the crime bearing No.207 of 2022 for the offences punishable under Sections 406, 420, 465, 467, 471, 468, and 120-B read with Section 34 of the IPC.

3. Respondents No.2 to 5 approached the learned Sessions Court for anticipatory bail. The present applicant also contested the bail application contending that respondents No.2 to 5 appointed the persons as Chairman and Secretary, who are not flat owners and created the false documents. They have not submitted the accounts of the first-year maintenance, they have not provided the amenities mentioned in the brochure, and the flat area was less than the area mentioned in the sale deeds. Thereby the applicants have misappropriated

the money of the flat owners and caused the wrongful loss to the flat owners.

4. The learned Sessions Court considered the arguments advanced by the complainant and, considering the entire facts of the case, has recorded the findings that the informant is not disputing that an account was opened in the bank in the name of "Vasukamal Flat Owners Association" and deposited the amount of Rs.84,47,592/- towards the money deposited for one-time maintenance. According to the informant, there is an irregularity in the procedure of transfer of the amount in fixed deposit, but the said amount is in the bank and not misappropriated by the applicant. So far as the amount paid towards first-year maintenance is concerned, it appears that report is lodged after the completion of one year of execution of the sale deed of the informant. In the sale deed, there is an averment that the maintenance amount for the first year is non-refundable. At this stage, there is nothing to say that at the inception of the contract, the applicants had the intention to deceive the informant. The learned Sessions Court has also observed that mere non-mentioning complete mobile number of Shital Rathi and Jayashri Rathi in the account opening form or mentioning the mobile number of respondent No.2 in the

bank account opening form is not sufficient to constitute the offence of cheating or forgery. The accused / respondents No.2 to 5, have made the complaint against the flat owners and filed a civil suit. Some of the flat owners made the complaint under Real Estate (Regulation and Development) Act, 2016. As such, *prima facie*, it appears that the civil dispute is based on documentary evidence. The accused / respondents No.2 to 5 have attended the Police Station from time to time. Considering all these aspects, the learned Sessions Court has granted respondents No.2 to 5 anticipatory bail.

5. The applicant/complainant, dissatisfied with the order granting anticipatory bail to respondents No.2 to 5, approached this Court under Section 439 (2) of the Cr.P.C. for cancellation of bail.

6. Learned counsel appearing for the applicant has vehemently argued that the order granting anticipatory bail to the accused is perverse, arbitrary and illegal on its face. The learned Sessions Court has mechanically granted the anticipatory bail without considering the material placed before it. The applicant has lodged the complaint under the Real Estate (Regulation and Development) Act, 2016, for compensation. He has vehemently argued that it is the modus

operandi of respondents No.2 to 5 to promise in brochure various facilities and actually they do not provide the facilities, not only this they also play the practice to give lesser area than they promise. Various flat owners have been cheated in the town. Respondents No.2 to 5 have looted huge amounts of money from the poor flat purchasers, which is their hard-earned money. It also vehemently argued that when respondents No.2 to 5 were on interim protection, they approached the Chairman legislative assembly. He directed the Hon'ble Home Minister and Home Minister directed to make an inquiry properly. It was an application complaining against the police that their complaint had not been considered and a false report had been registered against them. It has also been vehemently argued that the learned Sessions Court has erroneously recorded the findings that the dispute is of civil nature and all the flat owners were aware of the actual carpet area at the time of execution of the sale deed as the structure of the building was already completed. The learned Sessions Court overlooked the modus operandi of respondents No.2 to 5. There have been elements of cheating since its inception; therefore, the order is arbitrary and perverse. He has relied on the case of *Deepak Yadav Vs. State of U.P and another* reported

in *AIR 2022 S.C. 2514* and prayed to cancel the bail application.

7. The Court heard the applicant's counsel in detail before issuing notice to satisfy whether the case for cancellation of bail is made out.

8. The Hon'ble Apex Court, in the case of *Guruchan Singh Vs. State (Delhi Administration)* reported in *AIR 1978 S.C.* has held that rejection of bail at the initial stage and cancellation of bail already granted have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. It has been held that, generally speaking, the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of Justice or evasion or attempt to evade the due course of Justice or abuse of the concession granted to the in any manner. One such ground for cancellation of bail would be where ignoring material and evidence on record, a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reason.

9. The Hon'ble Apex court, in the case of **Deepak Yadav** (*supra*), has laid down the law as regards the cancellation of bail in paragraph No.30, which reads thus ;

"30. This Court has reiterated in several instances that bail, once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. Having said that, in case of cancellation of bail, very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail (which was already granted). A two-Judge Bench of this Court in Dolat Ram And Others Vs. State of Haryana 17 laid down the grounds for cancellation of bail, which are:-

- (i) interference or attempt to interfere with the due course of administration of Justice*
- (ii) evasion or attempt to evade the due course of Justice*
- (iii) abuse of the concession granted to the accused in any manner*
- (iv) Possibility of accused absconding*
- (v) Likelihood of/actual misuse of bail*
- (vi) Likelihood of the accused tampering with the evidence or threatening witnesses."*

10. The Hon'ble Apex Court also laid down the law in paragraph No.31, which reads thus :

"31. It is no doubt true that cancellation of bail cannot be limited to the occurrence of supervening circumstances. This Court certainly has the inherent powers and discretion to cancel the bail of an accused even in the absence of supervening circumstances. Following are the illustrative circumstances where the bail can be cancelled :-

a) Where the Court granting bail takes into account irrelevant material of substantial nature and not trivial nature while ignoring relevant material on record.

b) Where the Court granting bail overlooks the influential position of the accused in comparison to the victim of abuse or the witnesses especially when there is prima facie misuse of position and power over the victim.

c) Where the past criminal record and conduct of the accused is completely ignored while granting bail.

d) Where bail has been granted on untenable grounds.

e) Where serious discrepancies are found in the order granting bail thereby causing prejudice to Justice.

f) Where the grant of bail was not appropriate in the first place given the very serious nature of the charges against the accused which disentitles him for bail and thus cannot be justified.

g) When the order granting bail is apparently whimsical, capricious and perverse in the facts of the given case."

11. It has also been observed in paragraph No.34 by referring to the case of *Prakash Kadam and others Vs. Ram Prasad Vishwnath Gupta and another* reported in (2011) 6 SCC 189 in paragraph No.18 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 serious allegations against the accused, his bail may be cancelled even if he has not misused the bail granted to him". It has also been observed that, "there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail".

12. The facts of the said case were that the applicant had applied for regular bail before the Sessions Court, which was rejected on the ground that he is named in the FIR on the basis of the information provided by the deceased himself and that the same has been clarified after perusal of the documents/forms that the bullet was shot by respondent No.2. Then, the accused approached the High Court for bail under Section 439 of the Cr.P.C. for regular bail. The High Court was

pleased to grant the bail by impugned order without considering the relevant factors and circumstances. Considering the facts of the said case, the Hon'ble Apex Court was pleased to cancel the bail which was granted to the accused by the High Court.

13. The order granting bail may be cancelled if perverse and arbitrary. The Hon'ble Supreme Court in the case of ***Kuldeep Singh Vs. Commissioner of Police*** reported in (1999) 2 SCC 10 has defined the perverse order in the following words;

“A broad distinction has, therefore, to be maintained between the decision which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse.”

14. Here in the case, the record reveals that the learned Sessions Judge has considered the arguments advanced by the learned counsel for the applicant/complainant. The learned Sessions Judge has considered the entire material, including the actions taken by the complainant and others before the Court. The principle that the nature of accusations, the nature of evidence in support thereof, the severity of the punishment,

the character, behaviour, means, position and standing of the accused, the circumstances which are peculiar to the accused, reasonable possibility of securing the presence of accused in a trial, reasonable apprehension of the witnesses being tampered with, the larger interest of the public or State and similar other circumstances appears to have not been neglected have by the learned Additional Sessions Judge.

15. Here in the case, the allegations have been levelled against the accused/respondents No.2 to 5 that they did not fulfil the promises which they had made in the brochure. The sale deed was also registered, and after taking possession the dispute was raised. So far as the allegations regarding the one-time maintenance, the learned Sessions Judge has categorically observed the specific terms and conditions of the agreement about the non-refund of first-year maintenance. It has also been observed by the learned Sessions Court that the so-called amount is deposited in the bank; therefore, it cannot be said that it is misappropriated. Having regard to the observations recorded by the learned Sessions Court, this Court is of the view that it cannot be said that the contentions of the application have not been considered by it at all, and the inadmissible evidence has been given weight. The entire

necessary factors for granting anticipatory bail have been considered. Therefore, this Court does not agree with the learned counsel for the applicant that the order granting bail is perverse and arbitrary. Hence, liable to be interfered with under Section 439(2) of the Cr.P.C.

16. Therefore, the application stands dismissed.

(S. G. MEHARE, J.)

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