

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

APPLICATION FOR CANCELLATION OF BAIL NO.192 OF 2021

Nandkishor S/o Rambhau Kale

...APPLICANT

VERSUS

- 1) The State of Maharashtra,
- 2) Dnyaneshwar S/o Prakash Karhale,
- 3) Satish S/o Prakash Karhale

...RESPONDENTS

...
Mr.Dhananjay M. Shinde Advocate for Applicant.
Mr.V.M. Kagne, A.P.P. for Respondent No.1 – State.
Mr.N.S. Ghanekar Advocate for Respondent Nos.2 and 3.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 25th MARCH 2022

DATE OF PRONOUNCING ORDER : 8th JUNE 2022

ORDER :

1. Present Application has been filed under Section 439(2) of the Code of Criminal Procedure by the original informant to challenge the order passed on 7th June 2021 by the learned

Additional Sessions Judge, Hingoli below Exhibit-54 in Sessions Trial No.49 of 2016 thereby releasing respondent Nos.2 and 3 on bail under Section 439 of the Code of Criminal Procedure, in connection with Crime No.65 of 2016 registered with Goregaon Police Station, for the offence punishable under Sections 302, 307, 326, 323, 504, 506, 143, 147, 148, 149 of the Indian Penal Code.

2. Heard learned Advocate Mr. Shinde for the applicant, learned APP Mr. Kagne for respondent No.1 – State and learned Advocate Mr. Ghanekar for respondent Nos.2 and 3.

3. Learned Advocate appearing for the applicant has submitted that respondent Nos.2 and 3 came to be arrested on 2nd June 2016 and till the impugned order that was passed on 7th June 2021, they were behind bars. Respondent Nos.2 and 3 had approached the learned Additional Sessions Judge by filing bail application under Section 439 of the Code of Criminal Procedure below Exhibit-17 in Sessions Trial No.49 of 2016, however, that was rejected on 24th February 2017. Thereafter, they had approached this Court by filing Criminal Application No.1923 of 2017 and this Court disposed of the said application by specifically observing that when this Court was not inclined to

grant relief, the learned Advocate appearing for the applicants therein (respondent Nos.2 and 3 herein), on instructions, withdrawn the bail application. That order came to be passed on 26th April 2017. Thereafter, there was no attempt by respondent Nos.2 and 3 at any stage to get them released on bail. Thereafter, when the said application came to be filed below Exhibit-54, a specific statement was made on behalf of respondent Nos.2 and 3 by the Advocate who was representing them before the trial Court, that he has not submitted the bail application on merits but it has been filed only on the count of delay in trial and then he canvassed the right under Article 21 of the Constitution of India for speedy justice. The learned Additional Sessions Judge has, therefore, not even whispered about the merits of the case. However, the basic factors were not considered while passing the impugned order. It was pointed out by the learned Prosecutor to the learned trial Court that even the witnesses were present but accused persons had filed application for adjournment, therefore, they were the party to cause delay and therefore they are not entitled to be released on bail on the point of alleged delay. A very cryptic order has been passed. The ratio laid down in ***State of Kerala vs. Mahesh, 2021 DGLS (SC) 274*** has not been followed. The learned Additional

Sessions Judge relied on ***Smt. Akhtari Bi vs. State of Madhya Pradesh, 2001 DGLS (SC) 498*** and ***Pradeep Shivaji Shinare vs. the State of Maharashtra, ALL MR (Cri) 1317*** to contend that the accused has right of speedy trial. However, in ***Smt. Akhtari Bi vs. State of Madhya Pradesh*** (supra), itself it has been observed by the Apex Court that the said right is not an absolute right. No doubt it is observed that under Article 21 of the Constitution of India fundamental right has been given to the accused to apply for bail when there is delay in trial. However the situation that was prompted and also who was the instrumental to cause delay, ought to have been considered. When the earlier Judge of the trial Court as well as this Court had rejected the application filed by respondent Nos.2 and 3, the judicial propriety required the learned Judge, who passed the orders below Exhibit-54, to refrain from passing such orders.

4. Reliance has been placed by the learned Advocate for the applicant on the decision in ***Gopal S/o Muneshwar Singh vs. State of Maharashtra, 2018 DGLS (Bom) 42*** and ***Vinay Jaidev Wasankar vs. State of Maharashtra, 2021 DGLS (Bom) 1598***. In ***Gopal S/o Muneshwar Singh vs. State of Maharashtra*** (supra), it has been considered that when earlier bail applications have been rejected by the higher Court, then

the trial Court should be slow. Similar facts had taken place in that case and taking into consideration the chronology of events, this Court (Bench at Nagpur) was of the view that when the application itself was not maintainable before the trial Court, there was no occasion for the learned Judge of the Court below to consider the case of the non-applicant on merit and ought not to have granted bail. In ***Vinay Jaidev Wasankar vs. State of Maharashtra*** (supra), this Court has held that delay in trial cannot be the sole ground for bail in serious offences. Further, learned Advocate for the applicant has placed reliance on the decision in ***Union of India vs. K.A. Najeeb, (2021) 3 Supreme Court Cases 713***, wherein the Apex Court elaborated the distinction between the parameters under Section 439 and 439(2) of the Code of Criminal Procedure and held that, at the time of deciding an application for bail, it would be necessary to record reasons, albeit without evaluating the evidence on merits, but bail once granted by the trial Court, may be cancelled by the same Court only in case of new circumstances / evidence, failing which, it would be necessary to approach the higher Court exercising appellate jurisdiction.

5. Learned Advocate for the applicant has taken this Court through the Roznama of the trial Court and submitted that it demonstrates that on many occasions adjournments have been sought by respondent Nos. 2 and 3. When an illegal order has been passed, it cannot be allowed to be sustained and therefore, it deserves to be set aside under Section 439(2) of the Code of Criminal Procedure.

6. Learned Advocate appearing for respondent Nos.2 and 3 supported the reasons given by the learned Additional Sessions Judge and he has also relied on the affidavit on behalf of respondent No.2 stating that respondent No.2 is abiding by the conditions those have been imposed by the learned trial Court. It was pointed out that respondent Nos.2 and 3 were in jail for about more than five years and there was no much progress in the trial. The right of respondent Nos.2 and 3 to get speedy justice enshrined under Article 21 of the Constitution of India was jeopardized and therefore, the learned trial Judge has protected the said right. There is no necessity to interfere with the said order.

7. At the outset, it is to be noted that the statement was made on behalf of respondent Nos.2 and 3 before the learned

Additional Sessions Judge that they were not praying for bail on merits. When this Court, earlier, had clearly stated that it was not inclined to grant relief to respondent Nos.2 and 3 and allowed the application to be withdrawn at their request on 26th April 2017, then respondent Nos.2 and 3 could not have approached the learned Additional Sessions Judge for grant of bail on merits, because their earlier application was rejected by the learned Additional Sessions Judge and at the time when they were before this Court, already charge-sheet was filed. There was no change in the circumstance as such. The change in circumstance that was tried to be posed was non progress of the trial. Learned Additional Sessions Judge, Hingoli has passed very cryptic order and only relied on the fact that due to spreading of Covid-19, the jail authorities have not produced those accused persons before him and he has considered the happenings of the trial before him when the case was transferred to his Court in the month of December 2020. He ought to have seen as to how the matter had progressed after 26th April 2017, i.e. on the day the bail application before this Court was withdrawn, till December 2020 also. The Roznama would clearly show that on the earlier occasions the witnesses were also called but accused Nos. 3 to 6 had filed adjournment application. The entire

Roznama is before this Court, which shows that the other co-accused are asking for exemptions. It will not be out of place to mention here that those co-accused are from the same village and those who are on bail are related to respondent Nos.2 and 3. It appears that though many times respondent Nos.2 and 3 were brought before the learned Additional Sessions Judge, he has not taken the matter stating that he was busy in another matter. If he himself was busy in another matter, how he can blame the prosecution for the same. The witnesses were present on 19th October 2019 but adjournment was sought on behalf of the accused. Again on 19th December 2019 the witnesses were present, accused were also present. Though the APP had given application for issuance of summons, it would be for different witnesses and not those who were present before the Court, yet the matter was adjourned because the learned Judge was busy in another matter. It appears that thereafter the jail authorities have not produced respondent Nos.2 and 3 physically. It was for the learned Additional Sessions Judge to see that accused are produced at least through Video Conferencing and he could have proceed to record the evidence in absence of their physical presence, pre-Covid period. After spreading of Covid pandemic situation, definitely there was

Standard Operating Procedure and the work at the Sessions Divisions was totally hampered. But after some normalcy also it is the inaction on the part of the learned Additional Sessions Judge. It appears that the jail authorities have not produced the accused persons i.e. respondent Nos.2 and 3 on regular basis, but there was no hurdle for the learned Judge to start with the proceedings through Video Conferencing. Accused cannot be allowed to take advantage of such a situation. This Court agrees with the opinion in ***Vinay Jaidev Wasankar vs. State of Maharashtra*** (supra), wherein it has been held that applicant cannot be enlarged on bail merely because there is delay in trial. No doubt the facts are different and in that case certain witnesses were examined before the trial Court and the applicants therein were charged with serious economic offence of duping near about 800 people for huge sum of Rupees 127 Crores. Here respondent Nos.2 and 3 are charged for the offence of murder. There are eye witnesses to the incident and it can be still said that there is *prima facie* evidence against respondent Nos.2 and 3 and therefore, this Court was not inclined to grant any relief to them. In ***State of Kerala vs. Mahesh, 2021 DGLS (SC) 274*** (supra), in Para Nos.37 and 38, it has been observed as under:-

“37. There can be no doubt that the outbreak of the novel COVID-19 pandemic and its spread has been a matter of serious public concern. The virus being highly infectious, precautions to prevent spread of infection to the extent possible are imperative. In Suo Motu Writ Petition (Civil) No.1 of 2020 In Re : Contagion of Covid 19 Virus In Prisons, this Court expressed concern over the possibility of spread of COVID-19 amongst prisoners lodged in overcrowded correctional homes and accordingly issued directions from time to time, directing the authorities concerned to inter alia take steps as directed by this Court, to minimize the risk of spread of COVID amongst the inmates of correctional homes. This Court also directed that a High Powered Committee be constituted by the States and Union Territories to consider release of some prisoners on interim bail or parole during the Pandemic, to prevent overcrowding of prisons.

38. It appears that the High Court has completely mis-appreciated the object, scope and ambit of the directions issued by this Court from time to time in In Re : Contagion of Covid 19 Virus In Prisons. This Court did not direct release of all under-trial prisoners, irrespective of the severity of the offence. After hearing the learned Attorney General of India, Mr. Venugopal, the Amicus Curiae appointed by this Court, Mr. Dushyant Dave and other Learned Counsel, the States and Union Territories were directed to constitute a High Powered Committee to determine which class of

prisoners could be released on parole or interim bail for such period as might be thought appropriate.”

8. Thus, the Hon’ble Supreme Court observed that the order passed in Suo Motu Writ Petition (Civil) No.1 of 2020 should not have been mis-appreciated and the Supreme Court had not directed release of all under-trial prisoners, irrespective of the severity of the offence. The learned Additional Sessions Judge rather based on that Covid-19 situation, states that the right of speedy trial of respondent Nos.2 and 3 is hampered. The learned Additional Sessions Judge did not consider that even the victim and / or prosecution is also having right of speedy trial. However, this right cannot over power the others right. Taking into consideration the pendency of the cases, definitely there would have been hurdles but a balance would have to be struck and once a Sessions case is open for evidence then as per the rules in Criminal Manual, for its trial it should be taken up, as far as possible, within quick successions. Such unnecessary adjournments should be avoided and also a Judge cannot grant liberal adjournments to the accused persons. The order that has been passed by the learned Additional Sessions Judge is perverse and it is in a way to give a go-bye to his own duties to get the presence of respondents – accused secured through jail

authorities. Necessary directions can be given by the Additional Sessions Judge for the production of the under-trials and in addition to that if it is not possible for their physical presence, then now the technology has gone forward and the trials can be conducted through Video Conferencing.

9. This Court has called the status report from the concerned Judge and it has been given on 16th February 2022. Now, it appears that the accused – respondent Nos.2 and 3 have given application at Exhibit-72 for change of their Advocate and they were directed by the learned Judge to adopt the legal procedure. It is surprising to note that after getting the bail after about five years, all of a sudden respondent Nos.2 and 3 have thought that they should change their Advocate. This cannot be the mere coincidence. This will have to be taken as one of the step to prolong the matter. The learned Judge ought not to have then given so much of longer date for change of Advocate. It is then stated by the learned Judge that prosecution has cited 42 witnesses and according to him the trial can be over within three to four months from the initiation of recording of evidence. If the trial can be over within three to four months, then it is surprising why the learned Judge has not started it long ago. Whatever might have been happened in the past, but the order that has

been passed by the learned Additional Sessions Judge below Exhibit-54 in Sessions Trial No.49 of 2016 dated 7th June 2021 is unsustainable and deserves to be set aside under Section 439(2) of the Code of Criminal Procedure and necessary directions are required to be given for expediting the trial and making it time bound. Hence the following order:

ORDER

- (i) The Application stands allowed.
- (ii) The order passed below Exhibit-54 in Sessions Trial No.49 of 2016 dated 7th June 2021 by the learned Additional Sessions Judge, Hingoli, stands set aside.
- (iii) Respondent Nos.2 and 3 to surrender before the jail authorities on or before 5.30 p.m. on 17th June 2022. In case of their failure to surrender on that date, the learned Additional Sessions Judge, Hingoli may secure their presence by issuing non-bailable warrant.
- (iv) Learned Additional Sessions Judge, Hingoli to expedite the Sessions Trial No.49 of 2016 and to dispose it of on merits by

the end of October, 2022. It is clarified that the learned Additional Sessions Judge, Hingoli may secure the presence of respondent Nos.2 and 3 through Video Conferencing and conduct the recording of the evidence, in case of exceptional failure on the part of the jail authorities to produce them.

(v) The accused persons shall not take adjournments and the learned Additional Sessions Judge to be strict in grant of adjournments, however while doing so, he shall not deny proper opportunity to defend to the accused persons.

[SMT. VIBHA KANKANWADI , J.]

asb/MAY22

LATER ON:

. After pronouncement of the order, learned Advocate for respondent Nos.2 and 3 prays for staying operation of this order as respondent Nos.2 and 3 intend to approach Higher Court. In view of the same, the operation of this order is stayed till 30th August 2022.

[SMT. VIBHA KANKANWADI , J.]

asb/MAY22