

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO.195 OF 2021

SUDHAKAR S/O VASANTRAO TUNGAR
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

....

Advocate for Applicant : Mr. A. A. Nimbalkar
APP for Respondent No.1-State : Ms. Vaishali Patil Jadhav
Advocate for Respondent No.2 : Mr. A. R. Saboo

....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
11-02-2022**

**Date of Pronouncing the Order :
14-03-2022**

ORDER :

1. Present application has been filed by the original informant under Section 439 (2) and 482 of the Cr.P.C. to challenge the grant of bail to the respondent No.2 in Bail Application No.1564 of 2021, by learned Additional Sessions Judge-12, Aurangabad, on 03-09-2021, in connection with Crime No.61 of 2021, registered with Police Station Satara, Aurangabad City, Taluka and District Aurangabad, for the offence punishable under Section 420 of IPC.

2. Heard learned Advocate Mr. A. A. Nimbalkar for applicant,

learned Advocate Mr. A. R. Saboo for respondent No.2, and learned APP Ms. Vaishali Patil Jadhav for respondent No.1-State.

3. It has been vehemently submitted on behalf of the applicant that respondent No.2 was in need of money for his business, and therefore, upon his request, the applicant had extended friendly loan to the tune of Rs.3,20,000/- on 06-07-2020. The respondent No.2 had issued two cheques in favour of the applicant. So also he had executed a bond which was then notarized as a part of assurance about repayment of the loan. Respondent No.2 failed to repay the same within time framed. In order to avoid payment, respondent No.2 filed complaint before various authorities and had sent frivolous notices to the applicant and other persons with concocted stories. He had threatened to take action under the Money-Lending Act against the applicant and other various persons. This act rather shows that respondent No.2 has admitted that he had taken loan. But when the applicant realized that respondent No.2 has cheated him, he lodged the report. After the registration of the crime, respondent No.2 went absconding. He approached this Court by filing Criminal Application No.1061 of 2021 for quashing of the FIR. By order dated 09-07-2021 and 06-08-2021, this Court expressed

disinclination, and therefore, that application was withdrawn by respondent No.2. Thereafter, he had filed the application for anticipatory bail. The learned Additional Sessions Judge failed to see that it was the economic offence and the Court should be slow in grant of such relief which is extraordinary in nature. The evidence which was collected till then, was not considered at all by the learned Additional Sessions Judge. Though it was crystal clear that respondent No.2 had borrowed the amount from the applicant and he has not repaid it, the cheques got bounced. So also it was brought on record that respondent No.2 had cheated many other persons also and statements of those persons, who were cheated by respondent No.2, would show that he has cheated those persons to the tune of Rs.45.70 lakh. All those persons are waiting for their money, but the learned Additional Sessions Judge observed that there is no question of recovery of the amount. The State had objected that application, however, those objections were not considered by the concerned Court. As the bail has been granted to respondent No.2 based on incorrect statements by respondent No.2 and the material has not been considered at all, such order needs to be set aside.

4. The learned Advocate for respondent No.2 relied on the affidavit-in-reply filed by respondent No.2 and submitted that the application by the informant is not maintainable at all in view of the observations by this Court in *Pankaj Jivdhar Katke Vs. The State of Maharashtra and Another, Criminal Writ Petition No.1607 of 2018, decided on 05-02-2019*, wherein it was observed that :-

“When State has not made application for cancellation of bail, then merely respondent No.2 states that presence of the petitioner behind the bar is still necessary to complete the investigation, such submission cannot be considered.”

None of the conditions imposed by the learned Additional Sessions Judge have been breached, and therefore, application for cancellation of bail before the superior Court, is not maintainable. The offence was based on documentary evidence and nothing was required to be recovered or discovered at the instance of respondent No.2, and therefore, bail has been rightly granted. The applicant has filed complaint under Section 138 of N.I.Act against respondent No.2 and his family members. This shows that he has availed even the alternate remedy. Learned Additional Sessions Judge has exercised the discretion while granting anticipatory bail to

respondent No.2 correctly which requires no interference.

5. It is to be noted that the FIR has been filed by the present applicant and it says that he had extended loan of Rs.3,20,000/- to respondent No.2, and respondent No.2 had given two cheques as security or for the repayment of the said loan. It was assured that those cheques would be honoured upon their presentation. Bond was also separately executed, but it appears that, that amount was not repaid and the cheques were also dishonoured. When he made inquiry about respondent No.2, informant came to know that he has cheated 11 more persons. The informant went on to give names of those persons and contended that in a similar way those persons have also been cheated. Whether a common FIR is maintainable, would be a question which can be decided by the Trial Court, but the fact remains is that all of them i.e. applicant and the other persons had contended that they had extended hand loan to respondent No.2. In the normal course definitely the amount would have been refunded or the cheques would have been honored upon their presentation, but it appears that those cheques were dishonored and the informant had opted the remedy of lodging complaint under Section 138 of N.I.Act. Now, the applicant/ informant has come with

a case that he has been cheated by respondent No.2 as the amount which was taken as hand loan, has not been repaid or refunded.

6. Another attempt also appears to have been made by respondent No.2 when he filed complaint application against the informant and all those creditors in which he had contended that all of them are doing money-lending business. In fact, it is surprising that how all of them can do money-lending business. It is rather an adverse situation that many persons had given amount to respondent No.2, and respondent No.2 has not repaid that amount in respect of the informant and similarly situated witnesses. There cannot be a racket operating as money-lender. Each transaction with each of those persons is different. It appears that it was the friendly loan that was given to respondent No.2. The Division Bench of this Court had refused to entertain the application filed by respondent No.2 for quashing of FIR.

7. More concern has been shown by the applicant that respondent No.2 may abscond and learned Advocate for the applicant has relied on the ground No. 'E' (₹) stated by respondent No.2 in his Bail Application No.1564 of 2021 before learned Additional Sessions Judge. He has stated ground "E" as under :-

“(इ) आता कस्टोडीयल इंटरोगेशन ची आवश्यकता नाही. कारण आरोपीकडून काहीही जप्त होणे नाही व तो फरार होवून कुठेतरी हॉस्टेल मध्ये कॉट बेसीस वर राहतो.”

It is then submitted that when respondent No.2 himself had admitted that he would abscond and is also residing in some hostel on cot basis, the learned Additional Sessions Judge was not assured regarding his permanent address, still the anticipatory bail came to be granted. Though the said wordings are appearing in the application for anticipatory bail, it can be said that it is by way of typing mistake. None of the accused will say that he would abscond. No doubt, in the report given by the Investigating Officer while resisting the anticipatory bail application before the learned Additional Sessions Judge, Aurangabad, it is stated that the accused has gone absconding since the date of FIR. This Court is not impressed by the point for the simple reason that the applicant has stated where he is residing, so also he has assured the Court that he would attend the Court, then learned Additional Sessions Judge without any concrete evidence could not have opined that there is possibility of accused getting absconding.

8. Another fact to be noted is that no doubt the offence was

economic offence, but there is no total bar for grant of anticipatory bail. Here the basic nature of the transaction appear to be civil in nature. Money was given as hand loan. Two cheques were given for the repayment thereof. The amount was not repaid. Even the applicant has exercised his right to file complaint under Section 138 of N.I.Act. Merely because in this case the amount could not be recovered; that cannot be a ground for cancellation of bail. If a civil transaction is coupled with criminal transaction, then in appropriate cases the extraordinary powers under Section 438 of Cr.P.C. can be exercised.

9. What is appealing in this case is that while granting the anticipatory bail to respondent No.2, a condition was imposed on him that he should co-operate with the investigating agency for the purpose of investigation, as and when called upon. Further, it was also made clear that breach of any of the condition mentioned above, shall make applicant liable for cancellation of bail. Now copy of the police papers has been filed before this Court and the documents in the form of general diary details from 02-10-2021 to 23-11-2021 on many occasions notice was issued to respondent No.2 to remain present before the Investigating Officer. Even the

intimation was given to the wife of respondent No.2 on 30-10-2021, however, it is stated that he has not appeared before the Investigating Officer. Even Investigating Officer has specifically stated that the accused has not co-operated to the investigating agency. Definitely this amounts to breach of the condition to the bail. In the normal course, if the application would have been against breach of terms of condition, then the informant or the State could not have been allowed to come directly to this Court. But here the prayers are two fold. The legality of the order is also challenged and it has been stated by the Investigating Officer that he has not attended the police station though intimation was given to him.

10. Learned Advocate for the applicant has relied on the decision in *Raghubir Singh: Simranjit Singh Mann Vs. State of Bihar*, reported in 1986 (4) SCC 481, wherein observations have been made that :-

“Generally 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 course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigating,

by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. In such cases the bail granted can be cancelled either under Section 437 (5) or Section 439 (2) of Cr.P.C.”

11. Further, reliance has been placed on *Kanwar Singh Meena Vs. State of Rajasthan and Anr., reported in 2012 (12) SCC 180*, wherein it is observed that :-

“Cancellation of bail is a serious matter. Bail once granted can be cancelled only in the circumstances and for the reasons which have been clearly stated by Supreme Court in a catena of Judgments.....”

“10. Thus, Section 439 of the Code confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail, the High Court and the Sessions Court are guided by the same considerations as other courts. That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other

grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. The court has to only opine as to whether there is prima facie case against the accused. The court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. While cancelling bail under Section 439 (2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and

absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.”

12. Here in this case, merely because the State has not filed application for cancellation of bail, it cannot be stated that the application is not maintainable. Even the State can support the application filed by the informant for cancellation of bail. The observations in *Pankaj Jivdhar Katke (Supra)* were on a different footing. It was a plain case of misappropriation by a servant and it was not in the public interest, and therefore, the order of cancellation of bail passed by the learned Additional Sessions Judge was challenged in the writ petition before this Court, and in that context those observations were made. Here in this case, rather public money is definitely involved and the police papers show that respondent No.2 had taken amount from so many persons and had

not repaid the amounts. At the cost of repetition, it can be said that since the application was filed on two grounds, the second ground that is a breach of the condition can also be gone into by this Court and it was which otherwise could have been if the only ground, then the appropriate Court would have been the Additional Sessions Judge who granted the bail. Though in his affidavit-in-reply respondent No.2 has stated that there is no breach of term of bail, he has not produced any evidence on record which would show that he had attended the police station and made himself available for investigation. The documents in the nature of general diary details, would definitely show that in spite of intimation, he has not reported to the police station, and therefore, taking into consideration the ratio laid down in *Raghubir Singh: Simranjit Singh Mann (Supra)* as well as *Kanwar Singh Meena (Supra)*, the application deserves to be allowed. Hence, following order.

ORDER

- 1) Application stands allowed.
- 2) The order passed in Bail Application No.1564 of 2021, granting pre-arrest bail to respondent No.2, by learned Additional Sessions Judge-12, Aurangabad, on 03-09-2021, stands set aside.

3) Respondent No.2 to surrender before the Investigating Officer on or before 05.00 p.m. on 16-03-2022.

4) In case of failure on the part of respondent No.2 to surrender before Investigating Officer, the Investigating Officer may take up the legal steps.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.