

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1360 OF 2021

Abhishek s/o Ashok Malve,
Age 34 years, Occupation Labour,
R/o Ram Mandir Road, Ward No.5,
Shrirampur Tq. Shrirampur
District Ahmednagar.

...Petitioner

VERSUS

- 1) The State of Maharashtra,
Through City Police Station,
Shrirampur District Ahmednagar.
- 2) The Branch Manager,
The A.D.C.C.Bank Ltd.,
Ahmednagar Branch At Shrirampur Town
Tq. Shrirampur, Dist.Ahmednagar.

...Respondents

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Advocate for Petitioner : Mr. A. J. Patil
APP for Respondent No.1-State : Mr. S. P. Sonpawale
Advocate for Respondent No.2 : Mr. V. R. Dhorde
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 01-07-2022

JUDGMENT :

1. **Rule.** Rule made returnable forthwith. By consent, heard finally.
2. By invoking the Constitutional powers of this court under Article 227 of the Constitution of India and the inherent powers under Section

482 of the Code of Criminal Procedure, the petitioner challenges order dated 15-11-2021 passed by learned Additional Sessions Judge, Shrirampur, District Ahmednagar, in Misc.Cri.Appln. No.04 of 2021 thereby rejecting the application filed by the present petitioner under Section 440 of Cr.P.C. for relaxation of condition imposed in criminal bail application under Section 438 of Cr.P.C.

3. The present petitioner and others are involved in Crime No.347 of 2019 registered with Shrirampur City Police Station for the offence punishable under Section 406, 420, 465, 468 of Indian Penal Code. The petitioner/applicant had filed Bail Application No.251 of 2020 before learned Additional Sessions Judge, Shrirampur, District Ahmednagar, for anticipatory bail. That application came to be allowed on 13-01-2021 and condition No.2 was imposed thus :-

“2. The applicant shall deposit 50 % amount out of Rs.3,02,258/- with the A.D.C.C. Bank, Branch Shrirampur under protest within 15 date from the date of this order, reserving his right of civil remedy. A violation of this condition shall amount the cancellation of the bail automatically without any reference to this Court.”

It was thereafter by filing separate application under Section 440 of Cr.P.C., the applicant prayed for relaxation of that condition stating

that he is falsely involved in the case and he was in fact employed on daily wage basis in the shop of goldsmith by which he used to earn Rs.300/- to Rs.400/- per day on the day he used to get the work. He is unable to deposit the amount of Rs.1,51,000/- i.e. 50 % of Rs.3,02,258/-, and therefore, he prayed for relaxing the said condition/cancellation of that condition.

4. The said application was objected by the State and it was contended that involvement of the petitioner/applicant is clearly seen, huge public money is involved in the case.

5. After hearing both sides, the learned Additional Sessions Judge rejected the application on 15-11-2021.

6. Heard learned Advocate Mr. A. J. Patil for petitioner, learned APP Mr. S. P. Sonpawale for respondent No.1-State, and learned Advocate Mr. V. R. Dhorde for respondent No.2.

7. The learned Advocate appearing for the petitioner has relied on the decision of this Court in Criminal Application No.1418 of 2020 which was in respect of co-accused to whom also similar type of condition was imposed and this Court held that the learned Additional Sessions Judge without there being any rhyme or reason

seems to have imposed the conditions which are inappropriate in the facts and circumstances, and therefore, by allowing the said application cancelled the said condition regarding payment of amount. He also pointed out that in Cri. Bail Appln.No.45 of 2021, application filed by co-accused Kanchan Ashok Malve and another, the same Judge had not imposed any such condition regarding deposit of amount when that application came to be decided on 10-06-2021. He says that, yet the same Judge has rejected the said application filed by the petitioner on 15-11-2021 even after noting the decision by this Court in Criminal Application No.1418 of 2020. He further relied on the decision in *Sumit Mehta vs. State of N.C.T. of Delhi*, reported in 2013 (15) SCC 570, wherein it has been held that :-

“When High Court granted anticipatory bail to accused subject to deposit of an amount of Rs.1 Crore in fixed in the name of complainant, the Court is not totally excluded to impose a condition of this nature, but in this case Court could had not come to conclusion whether the allegations made are true or not which can only be ascertained after completion of trial, and therefore, when an onerous condition has been imposed, it has been set aside.”

8. The learned APP strongly opposed the application and submitted that the learned Judge has considered the nature of the offence. The amount involved was the public money wherein the bank amount was misappropriated by fabricating false documents, and therefore, the direction was given. The Courts under intervention under Section 440 of Cr.P.C. or even under Section 397 of Cr.P.C. is impermissible. The application was not maintainable, and therefore, it was rightly rejected. Similarly submissions have been made on behalf of respondent No.2 bank.

9. At the outset, it is to be noted that the requirements and conditions while dealing with an application under Section 438 of Cr.P.C. are set out in various pronouncements of the Hon'ble Apex Court as well as this Court and other High Courts. The law permits the Court granting bail to impose conditions, but those conditions are required to be imposed with judicious application of mind. At the stage of grant of anticipatory bail everything is prima facie and nobody could have come to the conclusion that those allegations in the FIR are true. The responsibility of the particular accused could not have been so fixed at the time of consideration of his anticipatory bail. No doubt, in the above decision in *Sumit Mehta*

(*Supra*) Hon'ble Supreme Court clarifies that the power of the Court to direct an accused to deposit amount is not totally excluded, but in order to arrive at that conclusion there has to be a concrete evidence. If such condition is imposed which is practically of such a nature that it will drive the operation of that order as non-est or could not have been utilized by the concerned applicant, there is no point in imposing such condition. In such cases it cannot be then said that the Court had put conditions with proper application of mind. Another fact in the present case is to be considered is that in the same condition the learned Additional Sessions Judge says that the violation of the said condition would amount to cancellation of bail automatically without any reference to the Court. There is no such power available to the concerned Court to mingle the order under Section 438 together with 439 (2) of Cr.P.C. Non observance of a condition cannot be anticipated in advance.

10. The learned Additional Sessions Judge had take a note of the order passed by this Court in Criminal application No.1418 of 2020, but tried to differ it on the ground that the facts are different. What ought to have been considered is the observation of this Court as to whether the such onerous conditions could have been imposed and

for that purpose the observations were very clear by this Court. No doubt in the present case the conditions were imposed by different Judge and the application under Section 440 of Cr.P.C. was before another Judge, and therefore, the subsequent Judge might not have gone against the order in normal parlance as he cannot sit in appeal over the order passed by his learned predecessor. However, when this Court had clarified the said position in Cri.Appln. No.1418 of 2020, there was no hurdle for the learned Additional Sessions Judge, Shrirampur to allow the said application for modification of the conditions to the bail. It was wrongly held that the application was not maintainable.

11. It has been harped upon that the main accused who was in the respondent bank had cheated and by fabricating documents and giving fake gold had taken gold loan or given gold loan to his relatives, and thereby according to the bank misappropriation has been committed. As regards the role of the applicant/petitioner is concerned while granting anticipatory bail, the concerned Court has stated that the applicant's father and uncle were the master mind of the crime as per the contention of the applicant. According to the prosecution amount of Rs.3,02,258/- is outstanding from the

petitioner/applicant. It was also noted that the investigation was complete and charge-sheet was also filed before learned Judicial Magistrate First Class, Shrirampur, and therefore, it was observed by the learned Additional Sessions Judge that no special circumstances are pointed out for compelling the custodial interrogation of the petitioner/applicant. Thus, when it was found that the custodial interrogation of the petitioner/applicant is not required for the purpose of investigation, such conditions ought not to have been imposed. The Courts cannot act as a recovery agent though they are supposed to protect the public money. Protection of public money is different from making recovery of the same and the recovery of public money cannot be by way of a condition to the bail, and therefore, the petition deserves to be allowed by using the Constitutional powers of this Court as well as inherent powers of this Court. Hence, following order.

ORDER

- 1) Writ petition stands allowed.
- 2) The order in Criminal Misc. Application No.04 of 2021, passed by learned Additional Sessions Judge, Shrirampur, District Ahmednagar, dated 15-11-2021 stands set aside. The said application stands allowed.

3) Condition No.2 imposed in the order in Criminal Misc. Application No.251 of 2020 by learned Sessions Judge, Shrirampur, District Ahmednagar, on 13-01-2021 stands set aside.

4) It is clarified that the rest of the order in Criminal Miscellaneous Application No.251 of 2020 stands confirmed.

Rule made absolute in above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.