

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

204 (2)

**CRR-179-2021
Date of decision: 25.04.2022**

HARPAL KAUR @ PALO

... Petitioner

Versus

STATE OF PUNJAB

.... Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: Mr. Tanvir Singh Grewal, Advocate
for the petitioner.

Ms. A.K. Khurana, DAG, Punjab.

VINOD S. BHARDWAJ. J.(Oral)

1. The present petition raises a challenge to the order dated 25.01.2021 passed by the Judge, Special Court, Sangrur whereby the bail granted to the petitioner vide order dated 11.11.2020 in case FIR No. 137 dated 14.05.2020 registered under Sections 21 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') was cancelled; Section 29 of the NDPS Act was added later on.

2. Learned counsel appearing on behalf of the petitioner contends that the petitioner was enlarged on regular bail by the Judge, Special Court, Sangrur vide order dated 11.11.2020. It is submitted that there was no concealment of any fact on the part of the petitioner and that all relevant & essential facts had been specifically disclosed by the petitioner. While dealing with the aforesaid application, it was noticed by

the Judge, Special Court that the recovery of 650 grams of Heroin was in the ambit of a non-commercial quantity. Accordingly, the petitioner was directed to be released on bail.

3. That an application for cancellation of bail was thereafter moved by the prosecution on 15.01.2021 i.e. after nearly 02 months of the bail having been granted and the said petition was allowed by the Special Court vide order dated 25.01.2021 and the bail granted was cancelled.

4. Learned counsel appearing on behalf of the petitioner contends that the impugned order passed by the Court is contrary to law inasmuch as the Supreme Court had held in the matter of "*Bhagirathsinh Judeja versus State of Gujarat*" reported as *AIR 1984 Supreme Court 372* that very cogent and overwhelming circumstances are necessary to exist before cancelling the bail. It is further pointed out that once an order of bail has been passed, a cancellation thereof can be invoked incase the said order has been secured by the Court or where the beneficiary thereafter misuses the concession of bail so granted to him or interferes with the course of investigation or administration of justice. It may also be cancelled where the petitioner commits breach of terms and conditions of order granting bail. He argues that, in the absence of any concealment by the petitioner, any mistake on the part of the Judge, Special Court cannot be the basis of cancellation of an order and that any such exercise of jurisdiction amounts to review of the final order passed by the Court and would thus be hit by Section 362 of the Code of Criminal Procedure, 1973.

5. Learned counsel also submitted that a total of 09 accused

have been arraigned in this case and that all other accused have also been enlarged on bail by the Court vide different orders. It is pointed out that the case is still at initial stages as supplementary challan was presented on 09.03.2021 and charge has been framed on 03.09.2021. He submits that there was no allegation of any misuse of concession granted to the petitioner since November, 2020 till the consideration of the instant petition by this Court. He also submits that the petitioner was not granted an opportunity of hearing and that order in question had been passed in the absence of any representation on behalf of the petitioner.

6. Learned counsel appearing on behalf of the respondent submits that the service with respect to the application seeking cancellation of bail was duly effected and that the report of the Process Server has also been relied upon. He contends that it is option of the petitioner whether or not to appear before the Court. The said order cannot be held bad in law merely because the petitioner had chosen not to appear before the Court. It is also argued that the order granting bail was on an apparent mistaken fact and that the Court had wrongly noticed the quantity to be non-commercial whereas the said quantity was commercial as per schedule of NDPS Act.

7. I have heard learned counsel for both the parties and have gone through the pleadings on record.

8. It is not a subject matter of dispute that there was no concealment on the part of the petitioner and that quantity as disclosed was noticed by the Court. The error committed, if any, is on the part of the court in observing that recovered quantity is non commercial. The same may be an erroneous foundation of an order, however, on the basis

thereof it cannot be alleged that the petitioner had secured the order by playing fraud upon the Court or by concealing material information.

9. It was observed by the Hon'ble Supreme Court in the matter of "Aslam Babalal Desai versus State of Maharashtra" reported as 1993 (1) R.C.R. (Criminal) 600 is that:-

"The deeming fiction of correlating the release on bail under Sub-section (2) of Section 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed under Sections 437(1) or (2) or 439(1) it follows as a natural consequence that the said order can be cancelled under Sub-section (5) of Section 437 or Sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in Raghubir Singh's case the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Sections 437(1) or (2) or 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

12. In State (Delhi Admn.) v. Sanjay Gandhi, 1978 (2) SCC 411: AIR 1978 Supreme Court 961 this Court observed rejection of bail when bail is applied for is one thing; cancellation of a bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail once granted. That is because cancellation of bail interferes with the liberty already secured by the accused either on the exercise of discretion by the court or by the thrust of law. This Court, therefore, observed that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. That does not mean that the power though extraordinary in character must not be exercised even if the ends of justice so demand.

13. In Bhagirathsinha Judeja v. State of Gujarat, 1984 (1) SCC 284: AIR 1984 Supreme Court 372 this Court observed that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail. Even where a prima facie case is established the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily-available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence. It is wrong to think that bails secured by virtue of the proviso (a) to Section 167 is an underserved one. To so think is to doubt the legislative wisdom in prescribing the outer limit for filing the charge-sheet and to ignore the legislative history. As pointed out earlier the legislative history of Section 167 shows that by proviso (a) the detention period was enhanced to a maximum of 90 days from 15 days earlier allowed. When the Legislature made it obligatory that the accused shall be released on bail if the charge-sheet is not filed within the outer limit provided by proviso (a), it manifested concern for individual liberty notwithstanding the gravity of the

allegation against the accused. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, e.g., an obliging investigation officer deliberately not filing the charge sheet in time, as such misconduct can be dealt with departmentally. To permit the prosecution to have the bail cancelled on the mere filing of the charge-sheet is to permit the-police to trifle with individual liberty at its sweet will and set at naught the purpose and object of the legislative mandate. The paramount consideration must be to balance the need to safeguard individual liberty and to protect the interest of administration of justice so as to prevent its failure. In the present case the High Court cancelled the bail solely on the ground that the bail was granted on technical grounds and the investigation revealed that there was eye-witness account disclosing the commission of a serious offence of murder. In its view the ratio of Rajnikant Jeevanlal Patel's case applies to the case with full vigour. We find it difficult to agree.

10. Undisputedly, there is no allegation to the effect that despite grant of bail vide order dated 11.11.2020, the petitioner was in any manner misusing the concession of bail granted to him and has indulged in any other offence. It is also not alleged that the petitioner has in any manner violated any of the conditions prescribed in order granting regular bail. The petitioner cannot be liable for mistake committed by the Court and that the remedy available to the prosecution, upon noticing an error apparent on the face, is to raise a challenge to the said order in a process known to law. The remedy against the error (factual, latent and patent) lay in the raising of the challenge to the said order and not by way of invoking different provision as prescribed under law and exercising jurisdiction under Section 439 (2) of the Cr.P.C. The parameters as

prescribed by judicial pronouncements for cancellation of bail are seemingly not fulfilled in the present case and there is no fraud or concealment on the part of the petitioner.

11. Even otherwise, considering the fact that all other accused/co-accused have already been granted concession of regular bail by the Court, there would no justification to mandate custodial detention of the petitioner at this stage.

12. The instant petition is accordingly allowed and the impugned order cancelling the bail of the petitioner is set aside.

(VINOD S. BHARDWAJ)
JUDGE

APRIL 25, 2022

Vishal Sharma

Whether speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No