

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

APPLICATION FOR CANCELLATION OF BAIL NO.194 OF 2022

XYZ
VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Karpe Rahul R.
APP for Respondent-State : Mr. Y. G. Gujrathi.
Advocate for Respondent No.2 : Mr. Narwade Narayan B.

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CORAM : S. G. MEHARE, J.

DATE : 10.08.2023

PER COURT :-

1. The Victim has applied under Section 439(2) of the Criminal Procedure Code (Cr.P.C. for short) for cancellation of default bail granted to respondent No.2/accused.

2. Heard the learned counsel for the applicant, learned APP for the respondent/State and learned counsel for respondent No.2/accused.

3. Learned counsel for the applicant objected that default bail granted to the accused under Section 167 (2)(a) of the Cr.P. C. was without mandatory notice to the victim. Hence, the said order is illegal. He would further argue that it was a case of gang rape. Hence, an order granting bail for the offence

punishable under Section 376 (DA) of the Indian Penal Code, along with the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (Atrocity Act for short) and the Protection of Children from Sexual Offences Act, 2012 (the 'POSCO Act' for short) without notice is perverse and illegal. Referring to Section 15(A)(3) of the Atrocity Act and Sections 40 r/w rules 4 (13) and 4 (15) of the POCSO Act, he has vehemently argued that in any bail application, including the default bail, notice to the victim is mandatory.

4. To bolster his arguments, he relied upon the case of, *Reena Jha and another Vs. Union of India and others; 2020 S.C.C. OnLine Delhi 1389*. He also relied on the case of *Jagjeet Singh and others Vs. Ashish Mishra @ Monu and another; 2022 LiveLaw (SC) 376*, in which the term 'victim' defined under Cr.P.C. and the right of the victim to participate in the proceedings, has been discussed. It has been observed that a victim within the meaning of Cr.P.C. cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. Based on the case laws and facts, he would further state that the learned Judge granting bail under Section 167(2)(a) of Cr.P.C. has committed a grave

mistake of Law and deprived the victim of participating in the proceeding. Hence, the order granting bail is liable to be cancelled.

5. Learned counsel for the accused/respondent No.2 has vehemently argued that the provisions of issuing notice to the victim for the offence punishable under Section 376(DA) would not apply for the default bail under Section 167(2)(a) of Cr.P.C. He would submit that Section 439 of the Cr.P.C. provides for the notice for the offences under Section 376(3), or 376(AB), 376 (DA) or 376 (DB) of the Indian Penal Code and where the bail has been claimed only under Section 439 of the Cr.P.C. He has vehemently argued that in the case laws relied upon by the applicant, the default bail was not under consideration. Therefore, the default bail under Section 167(2) (a) of the Cr.P.C. cannot be synonymous with the term 'bail' used in Sections 437 and 439 of the Cr.P.C. Otherwise, also the default bail was a matter of mathematical calculations. No one has a right to say on merit. If the opportunity was granted to the applicant, she had no scope to oppose the application other than the mathematical calculations. The applicant has filed a proceeding for quashing the F.I.R. It is pending, and some reports have been called. He submits that granting bail under

Section 167(2)(a) of the Cr.P.C. is a statutory right, and hence, he cannot be deprived of enjoying liberty.

6. The learned counsel for the accused has raised the question that the default bail under Section 167(2)(a) of the Cr.P.C. is different from the bail dealt with under Section 439 of the Cr.P.C. Hence, notice to the victim is not essential.

7. Section 15(A)(3) of the Atrocity provides that a victim or his dependent shall have the right to reasonable, accurate and timely notice of any Court proceeding, including any bail proceeding, and the Special Public Prosecutor of the State Government shall inform the victim about any proceedings under this Act. Sub Section (5) is most relevant, which provides that a victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.

8. Section 40 r/w Rules 4 (13) and 4 (15) of the POSCO Act mandates notice to the victim or her guardian or to the lawyer if engaged by her in every proceeding under the said Act.

9. Section 439 of the Cr.P.C. provides that before granting bail to the accused of an offence triable under Sub Section 3 of Section 376 or Section 376(AB.) or Section 376(DA) or Section 376(DB) of the I.P.C., the Sessions Court or the High Court shall give notice of the application for bail to Public Prosecutor and Sub Section (1-A) provides that the presence of the informant or any other person authorized by him shall be obligatory at the time of hearing of the application for bail to the person under Sub Section 3 of Section 376 or Section 376(AB) or Section 376(DA) or Section 376(DB) of the I.P.C. Reading the above provisions together with Section 15(A), Sub-sections (3) and (5) of the Atrocity Act. it could be understood that notice to the victim or informant is mandatory.

10. Sections 439 and 167(2)(b) deals with bail. The bail under Section 439 Cr.P.C. is known as regular bail. At the same time, a bail under Section 167 (2) (b) of the Cr.P.C. is known as default or statutory bail. However, the term 'bail' has not been defined in Cr.P.C. The judicial pronouncements defined the term "Bail" as that bail is the tentative release of an accused from custody. In other words, bail is the security for the accused person. The default on the part of the prosecution in filing the report under Section 173 of Cr.P.C. gives a right to the

accused to seek bail. Sub Clause (ii) of Sub Section 2 of Section 167 of the Cr.P.C. provides that on expiry of sixty or ninety days as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under these Sub-section (2) of Section 167 Cr.P.C., shall be deemed to be released under the provisions of Chapter XXXIII for the purpose that Chapter. Section 439 of the Cr.P.C. falls under Chapter XXXIII of the Cr.P.C. Reading these provisions, the Law is obvious that a default bail granted to the accused is deemed to be a bail granted under Section 439 of Cr.P.C. The entire procedure, as prescribed in Section 439 Cr. P C shall apply to the default bail. Therefore, the Court believes that the bail provided under Section 167(2) and 439 of the Cr.P.C. has no different meanings.

11. Section 15(A)(3)(5) of the Atrocities Act, Section 40 r/w Rule 4(13) and 4(15) of the POSCO Act mandate the notice of the bail to the victim or the guardian of the victim or person aggrieved. Admittedly, the notice of bail application was not issued to the victim before granting default bail to the accused. It is not the Law that the bail application under Section 167 of the Cr.P.C. shall be decided immediately without notice to the victim. Once the right to claim default bail arises, it does not

immediately cease. Hence, the notice of the default bail is mandatory in the offences applied in the present case.

12. Reading the provisions discussed above, there is no scope to believe the interpretation of learned counsel Mr. Narwade for the respondent/accused that the term 'bail' used in Section 439 and 167(2)(b) of the Cr.P.C. are not synonymous.

13. The right to hear before granting bail is a statutory right of the victim. Such a right cannot be taken away. Any order passed without following the mandate of the Law is incorrect and illegal. The mandatory provisions discussed above have not been followed while granting default bail. Hence, the order granting default bail to the accused is liable to be cancelled.

ORDER

- (i) Application for cancellation of bail is allowed.
- (ii) The order granting bail to the accused/respondent No.2 of the learned Special Judge, Shrigonda (below Exh.14) in Crime No.434 of 2022, dated 22.09.2022, stands cancelled.

- (iii) Respondent No.2/accused shall surrender before the learned Special Judge, Shrigonda, on or before 05.09.2023.

(S. G. MEHARE, J.)

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vmk/-