

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

APPLICATION FOR CANCELLATION OF BAIL NO. 212 OF 2022

Sameena Bashir Pathan and Others

..APPLICANTS

VERSUS

Ayub Dilawarkhan Pathan and Others

..RESPONDENTS

....

Mr. A.T. Jadhavar, Advocate for applicants

Mr. S.V. Sudrik, Advocate for respondent nos. 1 to 3

Mr. A.A. Jagatkar, A.P.P. for respondent no.4 - State

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CORAM : R.G. AVACHAT, J.

DATE : 02nd MAY, 2023

PER COURT :

1. This is an application for cancellation of anticipatory bail granted to Respondent Nos. 1 to 3 ('respondents') by the Court of Additional Sessions Judge, Ahmednagar. This application has been moved by the widow and two children of deceased – Bashir. The widow lodged the F.I.R. alleging the respondents to have first assaulted the deceased – Bashir and then set him ablaze.

2. Heard.

3. Learned counsel for the applicants would submit that the Applicant No.1 (widow of the deceased) is an eye witness to the incident.

The deceased was rushed to Sasoon Hospital, Pune for better treatment. An Executive Magistrate has recorded the statement-cum-dying declaration of the deceased, wherein the respondents have been alleged to have set him ablaze. The deceased died of burns. He would further submit that there is admittedly a dispute between the deceased and the respondents. The respondents have criminal antecedents. They have indulged in theft of mines and minerals. Documents in that regard have been placed on record to suggest several cases of theft of sand have been registered against them. It was also pointed out that post incident the respondents had threatened the informant and therefore, non-cognizable report has been registered against them. List of crimes registered against the respondents has also been adverted to. A statement of the husband of sister of the deceased was also pointed out, wherein it has been stated that soon before he was set ablaze, he (deceased) had made a phone call to him and informed of being assaulted. A screenshot of the call log has also been placed on record. He has also relied on the photographs of the deceased to indicate that the respondents had assaulted on his thigh with a sharp weapon. Averments in that regard finds place in the dying declaration. Learned counsel would submit that the alleged CCTV footage has been tampered with. According to learned counsel, investigating agency was hand in gloves with the respondents. They have also committed breach of the terms and conditions of order granting them bail.

4. Learned counsel for the applicants relied on the Apex Court's judgment in case of ***Harjit Singh Vs. Inderpreet Singh @ Inder and Another*** ***AIR 2021 SC 4017*** to ultimately urge for grant of application.

5. Learned counsel for the respondents and learned A.P.P. would, on the other hand, submit that the CCTV footage of the incident is available. The same indicates the deceased to have set himself ablaze. There are statements of mother and real brother of the deceased reinforcing the same. A charge-sheet for the offence punishable under Section 306 of the I.P.C. has been filed after investigation. According to them, learned Additional Sessions Judge has, after taking into consideration all the factors, rightly granted pre-arrest bail to the respondents. There is, therefore, no reason to grant the present application.

6. Considered the submissions advanced. Perused order granting anticipatory bail to the respondents. The Apex Court in Harjit Singh's case (supra) has referred case of ***Mahipal Vs. Rajesh Kumar, (2020) 2 SCC 118***, wherein it has been observed thus :-

“16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the

other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. In Neeru Yadav v. State of U.P. (2014) 16 SCC 508, the accused was granted bail by the High Court [Mitthan Yadav v. State of U.P.[2014 SCC OnLine All 16031]. In an appeal against the order [Mitthan Yadav v. State of U.P., 2014 SCC OnLine All 16031] of the High Court, a two-Judge Bench of this Court surveyed the precedent on the principles that guide the grant of bail. Dipak Misra, J. held:

“12. ... It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of, or bail is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the Court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the Court.”

17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to

consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment. The order [Rajesh Kumar v. State of Rajasthan, 2019 SCC OnLine Raj 5197] of the High Court in the present case, insofar as it is relevant reads:

“2. Counsel for the petitioner submits that the petitioner has been falsely implicated in this matter. Counsel further submits that, the deceased was driving his motorcycle, which got slipped on a sharp turn, due to which he received injuries on various parts of body including ante-mortem head injuries on account of which he died. Counsel further submits that the challan has already been presented in the court and conclusion of trial may take long time.

3. The learned Public Prosecutor and counsel for the complainant have opposed the bail application.

4. Considering the contentions put forth by the counsel for the petitioner and taking into account the facts and circumstances of the case and without expressing opinion on the merits of the case, this Court deems it just and proper to enlarge the petitioner on bail.” Thereafter this Court set aside the order passed by the High Court releasing the accused on bail.”

7. This being an application for cancellation of bail and not challenging the order granting anticipatory bail to the respondents herein,

existence of supervening circumstances or violation of the condition of bail may only be the grounds to be considered herein.

8. Although the deceased is said to have made a dying declaration before the Executive Magistrate and his widow (Applicant no.1), who claims to be an eye-witness, the fact is that on investigation of the crime, it was found to be not a case of murder. The deceased set himself ablaze. Statements of mother and brother of the deceased have been adverted to in this regard by learned counsel for the respondents. If at all the applicants find it to be a case for further investigation, the remedy is somewhere else. The deceased and Respondent No.1 were the real brothers. Admittedly, there is dispute over partition of ancestral land. Post grant of anticipatory bail to the respondents herein, nothing is there to prima facie indicate them to have misused the liberty. If they commit any other offence, law will take its own course. It is true that there is statement of husband of sister of the deceased. The same indicates that the deceased had made him a phone call to inform to have been assaulted by the respondents. The said statement gets eclipsed by the fact of there being a CCTV footage indicating the deceased to have immolated himself. So far as regards registration of non-cognizable offence against the respondents is concerned, the victim may approach the Court concerned to lodge the complaint in that regard. True, the photographs suggests the deceased to have suffered a cut injury to his right

thigh. The same is alleged to have been caused by the respondents. The same would be a matter of investigation. It is reiterated that the respondents may approach the appropriate forum for further investigation, if so advised.

9. In view of above, this Court finds no reason to cancel the bail granted to the respondents herein. In the result, application stands rejected.

(R.G. AVACHAT, J.)

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