

CRIMINAL WRIT PETITION NO. 631 OF 2023

... Petitioner

.... Respondents

2. The challenge in this Writ Petition is to the order dated 27/01/2023 passed by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai on an application dated 20/12/2022 moved by the Respondent No.3 seeking direction to the Petitioner to remain present on each and every date of hearing of the case being Case No.1506/Misc./2022 i.e., an application for cancellation of the bail granted to the Petitioner herein.

3. Learned advocate for the Petitioner submits that the order impugned herein is ex-facie unsustainable and illegal in view of the judgment of this Court in the case of *Deepak Gopaldas Bajaj v/s. Union of India and ors in Criminal Application No.2510 of 2008*. He, therefore, urged for setting aside the impugned order.

4. Learned advocate for the Respondent No.3 would on the other hand submit that he is an informant in a crime vide C.R.No.08/2022 registered for offence punishable under sections 406, 409, 420, 465, 467, 468, 471 r/w. 34 of the Indian Penal Code. It is a crime involving crores of rupees. As such, it is an economic offence. While granting the bail to the Petitioner, he (petitioner) gave an undertaking. Some conditions were also imposed while granting him bail. According to the learned advocate for Respondent No.3, the Petitioner has neither followed the directions nor complied with the undertaking dated 14/03/2022. According to the learned advocate for the Petitioner, the Petitioner in his undertaking gave a schedule of repayment of money to the Respondent No.3. The Petitioner sold his shares worth little over 135 crores. The Petitioner ought to have paid that amount to the Respondent No.3.

5. This Court does not propose to go into the question whether the Petitioner has committed breach of an undertaking dated 14/03/2022, since the very issue is pending before the Court of Additional Chief Metropolitan Magistrate. According to the learned advocate for Respondent No.3, the learned ACMM was justified in directing the Petitioner to remain present on each and every date of hearing of the application. He would further submit that two of the co-accused who had been granted bail, flew out of India for no return. If the application for cancellation of bail is granted in the absence of the Petitioner, there is every possibility of him flee away. Order may remain on paper only.

6. After having perused the judgment relied upon by the learned advocate for the Petitioner, this Court had given the learned advocate for Respondent No.3 an option. He was supposed to make a statement this morning. Learned advocate for Respondent No.3 has come with an affidavit seeking direction for transfer of an application for cancellation of bail to the Court seized of the criminal case (charge sheet).

7. Considered the submissions advanced by the learned advocate for the respective parties.

8. True, it is an economic offence of high magnitude. The Petitioner while granting him bail, has furnished an undertaking. Respondent No.3/informant has moved an application for cancellation of Petitioner's bail on the ground of breach of an undertaking and even conditions on which he was granted bail. The Court hearing the application for cancellation of bail, has directed the Petitioner to remain present on each and every date of hearing of the application. The Petitioner has therefore reason to sense as to what would be a final order on an application for cancellation of the bail. According to the learned advocate for the Petitioner if his bail is canceled, he would immediately be taken into custody. All his remedies to challenge the said order would get foreclosed. He is right in his submissions.

9. In ***Deepak Gopaldas Bajaj*** (supra), this Court has observed thus :-

“ 10. In the present case we are dealing with the question whether the Sessions Court possesses a power to compel presence of an accused during the pendency of an application under Sub-section 2 of Section 439 of the Code of Criminal Procedure, 1973 especially when the trial is not pending before the Court of Sessions. On perusal of the Code it is apparent that there is no such of power vesting in the learned Sessions Judge. This is a case where there is a total absence of a power and as

stated earlier, there is no inherent power vesting in the Session Court which could be exercised for ensuring the personal presence of the accused. If the case against the accused was pending before the Sessions Court which is considering the application for cancellation of bail, the position would have been different. If this Court is dealing with an application for cancellation of bail, in view of inherent power under Section 482 of the said Code, this Court can in an appropriate case issue direction to the accused to personally remain present at the time of hearing of application for cancellation of bail. However, a Court of Sessions does not have that power. ”

10. The gist of the judgment in case of **Deepak Gopaldas Bajaj** (supra) suggest that it is the court which is seized of the charge sheet can issue direction to the accused to remain present before it. Admittedly, the charge sheet in which the Petitioner is one of the accused, is pending before the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai while the application for cancellation of bail of the Petitioner has been withdrawn from the Court of ACMM (47th Court) and made over to the Court of Additional Chief Metropolitan Magistrate, 19th Court.

11. In view of the dictum of this Court in **Deepak Gopaldas Bajaj**

(supra), the Court of Additional Chief Metropolitan Magistrate has no authority/jurisdiction to direct the Petitioner to remain present before it on each and every date of hearing of application moved for cancellation of bail.

12. The learned advocate for Respondent No.3 therefore appears to have come with an affidavit to urge for direction to transfer the application to the Court of Additional Chief Metropolitan Magistrate, 47th Court. This Court had suggested the same on the previous date on which the learned advocate for Respondent No.3 was not agreeable.

13. The learned advocate for the Petitioner was right in submitting that the reasons are not known as to why the learned Chief Metropolitan Magistrate, has withdrawn the application retaining the main case with another court. In view of the same, this Court was though initially inclined to see that both the matters get together in one court, not inclined to concede to the submissions made by the learned advocate for the Respondent No.3. He may be at liberty to move an application either to Chief Metropolitan Magistrate or the Court of Sessions to have both the matters together.

14. Suffice it to say that impugned order is unsustainable in view of the judgment of this Court in case of ***Deepak Gopaldas Bajaj*** (supra). In view of the same, the order impugned herein i.e, the order dated 27/01/2023 passed by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai in Case No.1506/Misc./2022, is hereby set-aside.

15. Writ Petition stands disposed of.

PREETI
H JAYANI

(R.G. AVACHAT, J.)

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