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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1136 OF 2023**

1. Pandharinath Jagan Phadke	...
2. Eknath Dattu Phadke	...
3. Harishchandra Bhaga Phadke	...Applicants
vs.	
State of Maharashtra	...Respondent

**WITH
INTERIM APPLICATION NO.1833 OF 2023
IN
BAIL APPLICATION NO.1136 OF 2023**

Rahul Pandit Patil	...Intervenor
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In the matter between

Pandharinath Jagan Phadke & Ors.	...Applicants
vs.	
State of Maharashtra	...Respondent

Mr. Amit Desai, Senior Advocate with Mr. Manoj Mohite, Senior Advocate with Vishal Bhanushali, Vinay Bhanushali, Gopalkrishna Shenoy, Sandeep Patil, Jitesh Bhanushali, Sanmit Vaze for the Applicants.

Mr. Raja Thakare, Senior Advocate, Special Counsel with Siddharth Jagushte with Mr. A.R. Kapadnis APP for the Respondent-State.
Mr. R.D. Suryawnashi for the Applicant in IA No.1833/2023.

CORAM : S. M. MODAK, J.

DATED : 13TH JUNE 2023

P.C. :

1. Heard learned Senior Advocate Mr. Amit Desai for the Applicants, also heard learned Senior Advocate Mr. Thakare appointed as the Special Counsel and also heard learned Advocate Mr. Suryawanshi for the first informant.

2. The issue involved in this Bail Application is whether the Applicants are entitled to be released on default bail. Both the applicants came to be arrested in connection with an offence initially registered under sections 307, 143, 147, 148, 149, 341, 506, 506(2) 427, 120B of IPC and under sections 3, 25 of Arms Act and sections 37(1) and 135 of Maharashtra Police Act and under section 7 of Criminal Law Amendment Act and later on, the provisions of of sections 3(1)(ii), 3(2) and 3(4) of MCOC Act were invoked. There are in all 30 accused persons and these two Applicants amongst them. Sum and substance of the allegations in the FIR is that persons named in the FIR threatened the first informant-Rahul Pandit Patil by using arms and it is on account of threatening him not to contest the election of Kalyan Dombivli Municipal Corporation. The incident took place on 13th November 2022, in the afternoon at Ambarnath (East).

3. So far as factual aspects about “*date of arrest, date of first remand, calculation of 90 days, when did it expired, extension sought, grant of extension for 20 days and when it expired*” there is no dispute amongst parties. Those dates have been elaborately mentioned in para 16 of the Bail Application. Except one typing mistake in Point Nos.9 and 10 instead of 4th March 2023, it is typed as 4th April 2023.

4. The period for filing of charge-sheet even after extension expired on 3rd March 2023 and the Applicants exercised their right to ask for default bail on 4th March 2023. On the same date the charge-sheet came to be filed. This Application was rejected by learned Special Judge under MCOC Act, Thane as per order dated 6th March 2023, Thane. It is on page 82. On this background applicants moved this Court vide Bail Application No.973 of 2023.

5. In the meantime the Hon’ble Supreme Court has pronounced the judgment in case of ***Enforcement Directorate, Government of India Vs. Kapil Wadhawan in Criminal Appeal No.701-702 of 2020, dt. 27th March 2023.*** The view taken by learned Single Judge in case of Kapil Wadhwan Vs. Directorate of Enforcement & Others on 20th August 2020 (date of first remand is to be included) was

confirmed. On the background the Applicants withdrew Bail Application No.973 of 2020, on 5th April 2023, and then the Applicants have moved an Application before the same Judge on 31st March 2023 (page 94). **There is dispute amongst parties whether it is the second default bail application or whether it is continuation of request made on 4th March 2023.**

Second request/Continuation

6. According to learned Senior Advocate Mr. Desai this Application cannot be said to be the second Application but it is nothing but reiteration of request made earlier and in fact, they have moved the same Court in order give the Court further opportunity to reconsider the law laid down by this Court (in case of ***Deepak Satyavan Kudalkar Vs. The State of Maharashtra in LD/VC Criminal Bail Application No.197 of 2020, dt. 9th July 2020***) to the facts of the case.

7. Whereas according learned Senior Advocate Mr. Thakare, none of the contentions are correct. Their Bail Application No.973 of 2023 was pending before this Court. After pronouncement by the Hon'ble Supreme Court in case of ***Kapil Wadhawan's case***, the Applicants

have chosen to withdraw Bail Application No.973 of 2023, on 5th April 2023. Accordingly to him, apparently, it was for the reason that they have already moved the Special Court. The order dated 5th April 2023 is at page 91. According to learned Senior Advocate Mr. Thakare, the conduct of withdrawing this Application amounts to giving finality to the first order dated 6th March 2023. This argument is also reiterated by learned Advocate Mr. Suryawanshi.

8. In addition to above submissions, learned Senior Advocate Mr.Thakare submitted that the fresh request made before the learned Special Judge on 31st March 2023, has to be considered on the background that the chargesheet is already filed and according to him in fact, the Applicants have lost their right to ask for default bail. In support of his contention, he relied upon the observations of the Supreme Court in case of *Sanjay Dutt Vs. State, reported in 1995 Cri.L.J. 477* and more specifically the observations in para 52.

9. Whereas, it is submission of learned Senior Advocate Mr.Desai that the Application filed on 31st March 2023, cannot be considered to be fresh Bail Application but it was continuation of earlier request and as such their right is not extinguished even though the charge-sheet is filed.

About first order of rejection

10. Mr.Desai invited my attention as to how learned Special Judge committed wrong in rejecting the first default Bail Application. He invited my attention to the observations and more specifically in paras 15 and 17. According to him, learned Judge has wrongly interpreted the observations in case of ***Deepak Kudalkar*** (supra). He also commented about the observations of the learned trial Judge when he has observed that :

*“The judgment of the Apex Court in case of **Mustaq Ahmed & Ors. Vs. State of Maharashtra AIR 2009 SC 2772** was not brought to the notice of this Court while deciding the law in case of **Deepak Khudekar** (supra)”.*

According to him, even though learned trial Judge has understood the issue that's to say whether the date of first remand is to be included or excluded however, while applying the ratio he has committed mistake.

11. Whereas according to learned Senior Advocate Mr.Thakare, there is no fault committed by the trial Court on 6th March 2023. When the matter was pending before the Hon'ble Supreme Court in case of ***Kapil Wadhawan***, the Hon'ble Supreme Court has also

clarified

“what should be approach of the Courts when that reference is pending”.

It is reproduced in para 14 by the learned trial Judge in the order dated 6th March 2023.

12. Learned Senior Advocate Mr. Desai pointed out what is importance of right of accused persons about default bail and how it is indefeasible right. In order to buttress his submission, he relied upon the observations of the Hon’ble Supreme Court in case of

- a. *M.Ravindran Vs. Director of Revenue Intelligence* reported in *(2021) 2 SCC 616* and
- b. *Bikramjit Singh Vs. State of Punjab* reported in *(2020) 10 SCC 616*.

13. There is no dispute about the right of the accused persons to ask for default bail and it is also not disputed by learned Senior Advocate Mr. Thakare and learned Advocate Mr. Suryawanshi.

14. Now, prior to deciding this Bail Application, first of all it needs to be decided, whether the Application moved on 31st March 2023, is second default Bail Application or whether it is continuation of

earlier request ? Because fate of this application will depend upon decision on that issue.

15. It is also true that when Bail Application No.973 of 2023 was filed by the Applicants before this Court, there was no question of giving challenge to the order passed by learned Special Judge on 6th March 2023. Ultimately, the jurisdiction of this Court is co-extensive with jurisdiction of the Court of Additional Sessions Judge as contemplated under section 439 of the Code of Criminal Procedure. It is very well true that when Bail Application No.973 of 2023 was pending, the Applicants could have taken chance before this Court by pointing out what are observations made by this Court in case of ***Deepak Kudalkar*** and in case of ***Kapil Wadhawan's case***. In fact the learned Trial Judge in his order dated 6th March 2023, has wrongly observed that :

‘The date of first remand needs to be excluded’ (para 15)

Learned Senior Advocate Mr. Thakare agrees to this incorrect findings about interpretation of law.

Judgment cited

16. Learned Single Judge of this Court in case of ***Deepak Kudalkar***

has observed

‘The period in 167(2) of the Code of Criminal Procedure has to be calculated from the first date of remand/order and the said day cannot be excluded’ (para 48).

It means to say that the first date of remand has to be included while computing period of 60 days/90 days, extended period for filing of the charge-sheet. This view is reiterated by learned Single Judge of this Court in case of ***Kapil Wadhwan***.

17. According to learned Senior Advocate Mr. Desai, the learned trial Judge has committed another mistake in observing that :

*“The judgment of Hon’ble Apex Court in **Mushtaq Ahmed** was not brought to the notice of this Court”.*

For ready reference, he has produced a copy of the said judgment in Mushtaq Ahmed. According to him, the issue as to whether the date of first remand is to be included or excluded has never come up in that matter. This submission is also not disputed by learned Senior Advocate Mr. Thakare. The charge-sheet was not filed within extended period and in another matter extension to file charge-sheet

was granted. There is challenge to these orders before the Hon'ble Surpeme Court.

18. It is also true that this Court is not sitting as the Appellate Court while dealing with this Application. However, the facts and circumstances of the case compell me to make certain observations about the findings given in para 15 of the order dated 6th March 2023. It is for the reason that this Court has to decide whether the Application filed on 21st March 2023, is the second Bail Application or it is continuation of first Bail Application as contended by learned Senior Advocate Mr. Desai.

19. The order dated 6th March 2023, cannot be said to be order in the eyes of law. I agree to this submission. Even I am of the view that learned Special Judge wrongly observed that the date of first remand needs to be excluded. There is every reason to believe that learned Special Judge has not taken care to go through the observations in case of **Deepak Kudalkar**. In that matter it was observed as –

“In the light of above decisions and several precedents referred to above there cannot be exclusion of any period from authorised detention while computing the period of 60 days/90 days as the

case may be by invoking the provisions of General Clauses Act”.

(para 48)

This is not case of wrong interpretation but is clear case of misunderstanding the ratio in case of **Deepak Kudalkar**.

About withdrawl of application

20. On this background, the Applicants have chosen to approach this Court by way of fresh Bail Application. When that Bail Application was pending, the Hon’ble Supreme Court has answered the reference in case of **Kapil Wadhwan**. The view taken by learned Single Judge was confirmed. On this background, the Applicants have withdrawn the Bail Application No.973 of 2023, on 5th April 2023. On the facts and circumstances of the case it cannot be said that the act of withdrawal, amounts to waiving the rights to ask for default bail which they have exercised earlier.

21. Considering the facts, I do not think that the Applicants have waived their right to ask for default bail on the basis of right which they have exercised earlier. I do not think that the Applicants were wrong in withdrawing Bail Application No.973 of 2023, pending

before this Court. They have though it fit to bring it to the notice of the trial Court about pronouncement in ***Kapil Wadhwan's case***. They have already exercised the right to claim default bail on 04/04/2023 before the trial Court. Even if it is rejected, this is not end of the matter. Filing Bail Application No.973 of 2023 to this Court amounts to continuation of the exercise of right. After pronouncement of Kapil Wadhawan, they have only changed the forum of exercise of right. That is from this Court to Special Court.

22. Learned Senior Advocate Mr. Thakare read over the title clause of Application dated 31st March 2023 (page 94). When the contents are perused they have mentioned how the right has accrued to them. Earlier, they have also made it clear that in view of recent development of the judgment of ***Kapil Wadhwan's case*** they have asked for default bail.

23. The Hon'ble Supreme Court in case of ***Bikramjit Singh*** as referred above and more specifically in para 33 has reproduced the observations in earlier judgment. It is observed

“that even the Court frustrates infeasible right”.

I think this is a case wherein learned Trial Judge wrongly considered the observations in case of ***Deepak Kudalkar*** has certainly frustrated

indefeasible right of the present Applicants.

24. For the above reasons I hold that the Application made on 31st March 2023, cannot be said to be second Application. It can be considered as reiterating the request made for asking default bail.

About indefeasible right

25. The Hon'ble Supreme Court in case of ***M. Ravindran*** and in ***Bikramjit Singh*** has elaborately dealt with importance of indefeasible right. There is also discussion when it can be said that the right has accrued. The relevant discussion finds place in para 29, 31 and 33 of the judgment in case of ***Bikramjit Singh***. Whereas in case of ***M. Ravindran*** the default Bail Application was filed on 181st day of arrest i.e. on 1st February 2019 at 10.30 am. Whereas, additional complaint was filed on same day but at subsequent time. It is observed that the accused have already exercised their right to ask for default bail and right cannot be frustrated. The observations in case of ***Kapil Wadhwan*** by learned Single Judge of this Court are affirmed by the Hon'ble Supreme Court. It is observed in para 15 that

'We therefore declare that the stipulated 60/90 days remand

period under section 167 of the Code of Criminal Procedure ought to be computed from the date when a Magistrate authorises remand'.

26. Considering the above discussion, I hold that the Applicants are entitled to be released on default bail. Hence, the following order is passed :

ORDER

- (a) Applicant No.1-Pandharinath Jagan Phadke, Applicant No.2-Eknath Dattu Phadke and Applicant No.3-Harishchandra Bhaga Phadke be released on bail in connection with C.R. No.403 of 2022, registered with Shivaji Nagar police station, Thane for the offences punishable under sections 307, 143, 147, 148, 149, 341, 506, 506(2), 427, 120B of IPC and under sections 3, 25 of Arms Act and 37(1) and 135 of Maharashtra Police Act and under section 7 of Criminal Law Amendment Act and sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act, on furnishing personal bond and surety bond of Rs.50,000/- each.
- (b) The Applicants to give attendance to the Shivaji Nagar police station, Thane City on first Monday of every month from 10 am to 12 noon for two years.
- (c) The Applicant shall not threaten the prosecution witnesses

or allure them in any manner.

- (d) The Applicants are directed to attend the trial punctually.
- (e) Needless to say, violating of the condition above will make the Applicant liable for cancellation of bail, after notice to the Applicants.

Request for stay

27. After the order was dictated, learned Advocate Mr.Suryawanshi requested that stay be granted to this order for two weeks.

28. It is opposed by learned Senior Advocate Mr. Mohite for the Applicants. When this Court has already observed that indefeasible right has already accrued, I do not find any reason to stay this order. If they will succeed before Hon'ble Supreme Court, the Applicants will certainly be bound by that order.

29. Application is disposed of accordingly. Consequently, Interim Application No.1833 of 2023 is also disposed of.

30. All the parties to act on an authenticated copy of this order.

[S. M. MODAK, J.]