

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.2912 OF 2023  
IN  
CRIMINAL APPLICATION NO.932 OF 2023**

Mr. Hemant Girdharilal Bohra ...Applicant

In the matter of

Anil Shantilal Parekh ... Applicant

VS.

The State of Maharashtra ...Respondent

**CRIMINAL APPLICATION NO.932 OF 2023**

Mr. Anil Shantilal Parekh ...Applicant

VS.

The State of Maharashtra ...Respondent

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Dr. Abhinav Chandrachud a/w Mr. Shailesh Kumar Rai a/w Mr. Rohan Naidu, Advocate for the Applicant in APL/932/2023.

Mr. Ashish Mehta a/w Mr. Shwan Fernandes a/w Mr. Jay Raj Popat i/b. Mahesh Rajpopat for the Applicant in IA/2912/2023.

Mr. Hemant Bohra, Orig. Complainant present.

Mr. S.R. Agarkar, APP for Respondent – State.

Mr. Siddharth Dudhmal, PSI Kasturba Marg Police Station present.

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**CORAM :S. M. MODAK, J.  
DATE :20<sup>th</sup> DECEMBER 2023**

**P. C. :-**

**Interim Application No.2912 of 2023**

1. Present Respondent No.2 is first informant.
2. Let the Applicant to join him as party Respondent.

Amendment be carried out forthwith. Interim Application is disposed of.

**Criminal Application No.932 of 2023**

3. Heard learned Advocate Dr.Chandrachud for the Appellant - Accused, learned Advocate for first informant and learned APP.

4. The issue involved in this application is whether the Court of Additional Sessions Judge, Dindoshi is right in cancelling the bail granted to this applicant by the Metropolitan Magistrate, 68<sup>th</sup> Court, Borivali.

5. Learned Magistrate as per order dated 5<sup>th</sup> April 2023 granted bail to this Applicant. First informant applied for cancelling before the Sessions Court and the bail was cancelled *vide* order dated 05<sup>th</sup> April 2023. Now original accused is praying for setting aside the said order and confirm the bail granted to him by the learned Magistrate.

6. Learned Advocate Dr. Chandrachud supported the order of the learned Magistrate and submitted that the learned Additional Sessions Judge was wrong in reversing the said order. He made following two submissions on legal issues:--

Bail by Magistrate as per proviso

(I) Even though when the offence is under section 409 of

IPC (punishable with life imprisonment), as per first proviso to sub-section (1) of 437 of Cr.P.C. if the accused is sick person, bail can be granted by the trial Court Magistrate. To buttress his submissions, he relied upon the observations in case of ***Sundeep Kumar Bafna vs. State of Maharashtra and Anr.***<sup>1</sup>, wherein the Hon'ble Supreme Court had an occasion to compare the provisions of Section 437 on one hand and under section 439 of the Code on the other hand. (Para No. 25) There was an issue whether an accused can directly surrender before the High Court.

Bail by JMFC when rejected by Sessions Judge

(II) According to him, even if earlier Sessions Court has rejected the bail application, still Subordinate Court can deal with the bail application if there is a material change. In this case, the Court of Additional Sessions Judge has rejected the bail applications filed in succession by this applicant and on this background, the Court of learned Metropolitan Magistrate has granted bail to this applicant predominantly on account of his ailment. To buttress the submissions, he relied upon the observations in case of ***Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu***

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<sup>1</sup> (2014) 16 SCC 623

***Yadav and Anr.***<sup>2</sup>, and more specifically the observations in paragraphs 18, 19 and 20.

Additionally, he made the following two submissions:--

Looking into the documents

- (a) This Court can certainly look into the documents in support of the ground of sickness. Even though they are not either before the learned Magistrate nor before the Additional Sessions Judge. These documents are annexed on page 574 to 588. To buttress his submissions, he relied upon the following judgments:-

- (i) ***K.L. Tripathi vs. State Bank of India and Ors.***<sup>3</sup>  
***(page 43);***

Paragraph 43 wherein it is observed that even though the reasons are not expressly stated, they are implicit in the order.

- (ii) ***M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and Anr.***<sup>4</sup> (para 9).

The award cannot be set aside simply because there is a serious flaw in the award, if there is evidence on

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2. (2005) 2 SCC 42

3. 1984(1) SCC 43

4. (1974) 3 SCC 318

record of the Tribunal's conclusion.

Non-application of Section 409 of IPC

- (b) He also submitted that considering the allegations in the FIR no offence under section 409 of IPC is disclosed. It is for the reason that the first informant has parted away money for the purpose of purchase of two wheelers and after parting away money does not remain as it is.

To buttress this submission, he relied upon the following judgments:-

- (a) ***Deochand Durlabhji Jogi vs. Madanlal Gopikisan Sharma***<sup>5</sup>;
- (b) ***K.L. Tripathhi vs. State Bank of India and Ors.***<sup>6</sup>;
- (c) ***K.M.S. Lakshmanier and Sons. vs. The Commissioner of Income Tax and Excess Profits Tax, Madras***<sup>7</sup>;
- (d) ***State of Gujarat vs. Jaswantlal Nathalal***<sup>8</sup>.

7. On this background, he submitted that let order of Additional Sessions Judge be set aside alternatively, he

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5. (1967) SCC OnLine Bom. 88

6. 1984 SCC Bom. 74

7. 1953 SCR 1057

8. (1968) 2 SCR 408

submitted that if this Court feels, matter may be remanded to the Court of Additional Sessions Judge.

Submission of First informant

**8.** By way of reply, the learned Advocate for the Respondent No.2 first informant made the following submission:-

- (a) This is not only an offence against the present applicant but there are two offences of similar nature;
- (b) He submitted that the Court of Additional Sessions Judge has rejected the bail application of this applicant on three occasions. They are as follows:-
  - (i) His application was rejected as investigation was at preliminary stage;
  - (ii) It was rejected as the Investigating Officer intends to file supplementary charge-sheet;
  - (iii) It was rejected for the reason that supplementary charge-sheet was not filed.
- (c) He invited my attention to the observations in the order dated 5<sup>th</sup> April 2023 passed by the learned Magistrate wherein It is mentioned that -  
*“the bail application filed was rejected on 3<sup>rd</sup> October 2022 in the meantime charge sheet came to*

*be filed on 22<sup>nd</sup> November 2022 and charge is not framed”.*

(d) According to him, the Court of Additional Sessions Judge has rejected regular bail applications. It was not proper on the part of the learned Magistrate to grant bail.

(e) He supported the order under challenge for following reasons :-

(i) The observations by the Court of Additional Sessions Judge that *“the learned Magistrate misdirected himself from the record is correct”*. (para 17)

(ii) The documents produced in support of medical ailment were old documents and they were not sufficient (para 18 and 19).

### Consideration

**9.** So the issues involved are:-

- (a) If the offence is punishable with life, whether Magistrate can grant a bail?
- (b) When bail is rejected by the Sessions Court, whether Magistrate can grant bail?
- (c) About non-application of Section 409 of IPC.

(d) Whether this Court can consider additional documents?

Bail as per proviso to Section 437 of the Code

**10.** It is true that Section 437 of the Cr.P.C. deals with the power to grant bail in case of non-bailable offence. The section further classifies the offences on the basis of type of punishment. If the offence is punishable with death or imprisonment for life said person shall not be released, if there are reasonable grounds for believing that he has been guilty of that offence.

**11.** It is true that similar provision does not find place under section 439 of the Cr.P.C. It is also true that as per Section 439 of Cr. P.C., the Court is not acting as an Appellate Court. This power is independent power. It is also true that there are only two pre-requisites for exercise of powers under section 439. One person accused of any offence and second he must be in custody.

**12.** In this case, we have to deal with the question whether the learned Additional Sessions Judge is right in cancelling the bail. It is also true that as per the first proviso to sub-section (1) of section 437 of Cr. P.C., a person can be granted bail if he is sick. **Mean to say, even if there is reasonable ground for**

**believing that he is guilty of offence as mentioned above still the Court can exercise discretion to grant bail if he is sick.**

Bail by JMFC when rejected by sessions judge

**13.** It is also true that once the Sessions Court has dealt with any bail application and rejected it there is no prohibition for filing of the application before subordinate Court i.e. Court of Judicial Magistrate. Only embargo is the Court of Judicial Magistrate has to consider those observations and will have to satisfy himself that there is change in circumstance. In this case, it is true that the learned Magistrate has taken note of filing of the charge sheet but it is true that learned Magistrate has not made any comment about merits of the matter i.e. to say what are the materials submitted along with the charge-sheet.

**14.** Learned Advocate for the first informant invited my attention to the grounds taken by the Applicant in his bail application filed before the Court of Metropolitan Magistrate. It is true that ground No.A mentions about the ailment.

**15.** Learned Advocate Dr. Chandrachud fairly admitted that the documents to support the ailment now filed before this Court were neither filed before both the Courts below. When

the bail is sought before the learned Magistrate on the ground of ailment, I think the learned Magistrate was not wrong in inquiring about the claim for bail on the ground of ailment. Now, the issue is whether he has exercised the discretion properly. The observations to that effect by learned Additional Sessions Judge are not correct (Para No. 17 of the impugned order).

#### Non-application of Section 409 IPC

**16.** It is also true that the contentions which are now raised before this Court about non-application of Section 409 of IPC were not canvassed before both the Courts below. So it is not proper for this Court to make any observations at this stage.

#### Supporting Medical documents

**17.** If such submissions are made before the concerned Court they are at liberty to deal with the same on the basis of merits. When I have perused the order passed by the learned Magistrate what is observed is :-

- 1) Medical papers reveals that there is major fluctuation and imbalance of blood pressure of accused.
- 2) In spite of the treatment in jail the Applicant is not keeping well and his condition is

deteriorating day by day.

Except these observations, there are no other materials.

**18.** Learned Magistrate has not referred in the order what are the observations by the present doctors about his health, neither the learned Magistrate has called fresh report. Even learned Additional Sessions Judge has observed in paragraph No.18 that -

*“he was suffering from flu in the month of October 2022, whereas the medical certificate dated 30<sup>th</sup> September 2022 goes to show that the Applicant is not having any complaint of ill-health”.*

Learned Additional Sessions Judge further noted -

*“about the hemoglobin, sugar level and blood pressure”.*

The findings recorded by the learned Additional Sessions Judge is proper according to me whereas, the findings by the Court of Metropolitan Magistrate is not supported by the documents.

**19.** Now, the question arises whether the documents which are filed on page 574 to 588 can be considered by this Court. It is true that if the Court finds that these documents do support

the case of ailment, the Court can certainly consider it. There are certain lacunae pointed out by the learned Advocate for the first informant in two of the certificates issue of Dr. (Mrs.) Ila D. Shah.

**20.** First certificate dated 22<sup>nd</sup> July 2022 does not bear the stamp. Whereas, second certificate of page 575 does not bear date and the seal. What is ailment? Ailment is Applicant is suffering from Parkinson disease and he is aged 77 years old.

The documents from page 576 to page 587 are the medical case papers from the Government Hospital starting from 28<sup>th</sup> September 2022 whereas page 588 is blood report of this Applicant.

**21.** This Court feels that these documents are not sufficient to consider prayer for continuation of the bail on the ground of ailment. So what I feel is that the order of Court of Additional Sessions Judge is proper and after considering new document, this Court is not inclined to consider the continuation of the bail granted to this Applicant in view of lacunae in them. Admittedly, these documents were not produced before both the courts below and there is no explanation forthcoming.

**22.** In view of this, following order is passed :-

**ORDER**

- (i) Criminal Application No.932 of 2023 is dismissed;
- (ii) Applicant is granted three weeks' time to surrender from the date of uploading of the order.

**[S. M. MODAK, J.]**