



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT NAGPUR, NAGPUR.

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**CRIMINAL APPLICATION (APL) NO. 1485/2023**

- 1) Shivaji s/o Kisan Bhorje  
Aged about 62 years, occu. Retired
- 2) Sadashiv s/o Kisan Bhorje  
Aged about 64 years, occu: Agriculturist
- 3) Ketan s/o Sadashiv Bhorje  
Aged about 34 years, occu: Agriculturist
- 4) Sandip s/o Shivaji Bhorje  
Aged about 33 years, occu: Doctor.
- 5) Kiran s/o Sadashiv Bhorje  
Aged about 39 years occu: Agriculturist

1 to 5 R/o Deulgaon-Mahi  
Tah. Deoulgaonraja, Dist.Buldana.

- 6) Yuvraj s/o Raoji Musadwale  
Aged 41 years, occu; Teacher  
R/o Goregaon Tq.Deulgaonraja  
Dist. Buldana.

**..APPLICANTS**

**v e r s u s**

- 1) State of Maharashtra  
Through Police Station Officer  
Andhera, Tq. Deulgaonraja, Dist. Buldana.
- 2) Ramesh Himmatrao Bhorje  
Aged 46 years, occu: Agriculturist

- 3) Sau. Jijuabai Ramesh Bhorje  
Aged 38 years occu;Agriculturist

2 & 3 R/o Deulgaon-Mahi  
Tal.Deulgaonraja, Dist. Buldana.

**..RESPONDENTS**

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Mr.A.S. Mardikar, Senior Counsel assisted by Mr.P.J.Mehta, Advocate for applicants

Ms.Kavita Bhondge, APP for Respondent no.1-State

Mr. A.J.Thakkar, Advocate for Respondent no.2. and 3

**CORAM: ANIL L. PANSARE, J.**

Date of Reserving: 31.10.2023

Date of Pronouncement: 02.11.2023

**JUDGMENT :**

At the request of learned Senior Counsel for the applicants leave to amend the prayer clause, so as to add “Deulgaonraja, Court No. 2” after the words ‘Judicial Magistrate, First Class’ is granted. The amendment be carried out forthwith.

2. Rule. Rule made returnable forthwith. Heard finally, with the consent of the learned counsel for the respective parties.

3. The applicants/original accused are aggrieved by the order dated 13<sup>th</sup> October, 2023 passed by learned Additional Sessions Judge, Buldana in Criminal Misc. Application No.57/2023 canceling the bail granted by the learned Judicial Magistrate First Class, Buldana ( in short the “learned Magistrate”) in Crime No.144/2023.

4. Briefly stated, the relevant facts of the case are these:

The non-applicant no. 2 is the original informant. On 27<sup>th</sup> May 2023 he has lodged the report with Police Station, Andhera, alleging that the incident took place near Gram Sabha, Dulgaonraja. According to him, he and his brother are the owners of ancestral field property bearing Gut No.74/3 of Gram Saramba. The applicants are his relatives. The applicant no.1 owns the field property which is adjacent to the property belonging to the non-applicant no.2. There occurred a quarrel between the two on account of alleged encroachment made by the non-applicant no.2. This quarrel occurred on 4<sup>th</sup> April, 2023. On 27<sup>th</sup> May 2023, again, there occurred a quarrel between the parties on account of encroachment which resulted into assault and beating between the two parties. Subsequent to the incident, both the parties have lodged reports with Police Station Andhera. The report lodged by the non-applicant no.2 against the applicants has been registered vide Crime No.144/2023 for the offences punishable u/ss. 143, 147, 326, 324, 149, 135 of the Indian Penal Code. (in short "IPC"). Prior thereto, the applicant No.1 had lodged a report against the non-applicant no. 2 and ten others, which has been registered vide Crime No.143/23 for the offences punishable u/ss. 143, 147, 148, 149, 307, 325, 324 of IPC and Sec.135 of the Bombay Police Act, 1951. The allegations in both the reports appear to be assault by means of iron rod, sticks etc.

5. The applicants had filed an application before the learned Magistrate u/s 437 of the Code of Criminal Procedure, 1973 ( in short, "the Code"). The learned Magistrate has noted that the statement of witnesses has been recorded, weapon of crime has been seized, root cause of the dispute is civil in nature, the counter cases have been filed etc. As regards the offence punishable u/s. 326 of the IPC, the learned

Magistrate has observed that though the offence is non-bailable, it is triable by the Court of Magistrate. Thus, considering the totality of the circumstances, the learned Magistrate has allowed the application.

6. This order was challenged by the non-applicant nos. 2 and 3 in Cri.Misc.Application No. 57/2023 before the Sessions Court. The Sessions Court has noted that the offence punishable u/s 326 of the IPC is punishable upto life imprisonment or with imprisonment for a term which may extend to ten years. The Sessions Court has then noted that the restrictions imposed under clause (i) of sub-section (1) of Section 437 of the Code which provides that a person accused of a crime shall not be released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life has not been considered by the learned Magistrate.

7. The Sessions Court has relied upon the judgment in the case of Jagjeet Singh and others vs. Ashish Mishra & another, reported in (2022) Vol.9 SCC 321, wherein the Apex Court held that the victim has unbiddled participatory rights from the stage of investigation till the culmination of the proceedings which includes an appeal or Revision. The Court, however, noted that this right should not be conflated with certain statutory provisions such as those present in the Special Acts, like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. The Court, then, noted that where the victims themselves have come forward to participate in a criminal proceedings they must be accorded an opportunity of fair and effective hearing.

8. The facts before the Hon'ble Supreme Court were that the victim therein who suffered loss of life in the family, was to oppose the application filed by the accused seeking bail. The counsels who were arguing the matter through video conferencing, due to technical glitch, got disconnected from the online proceedings and could not make effective submissions before the High Court. Accordingly, the Supreme Court held that the victim did not get fair and effective hearing at the time of granting bail to the accused therein.

9. Mr. A.J.Thakkar, the learned counsel for the non-applicant nos. 2 and 3 has also relied upon the judgment cited *supra*, to contend that the learned Magistrate has not provided opportunity of hearing to the victim and, therefore, the learned Sessions Court has rightly interfered with the order passed by the learned Magistrate.

10. The argument appears to me to be misplaced, inasmuch as the learned counsel for non-applicant nos. 2 and 3 has failed to show that they appeared before the Court of learned Magistrate and sought permission to oppose the bail application and were not afforded an opportunity of hearing. This is not even the case of non-applicant nos. 2 and 3. The Sessions Court though relied upon the aforesaid judgment, has failed to note the vital observations made by the Supreme Court that the unbridled right of the victim to participate from the stage of investigation till the culmination of the proceedings should not be conflated with the statutory provisions like Special Acts, where there is a legal obligation to hear the victim at the time of granting bail. In that sense, what has been held by the Supreme Court is that in the cases not covered by the Special Acts, where the provisions as mentioned above of

hearing the victim before granting bail is mandatory, the victim will have a right to participate in the proceedings, that does not mean that in every proceedings which are not covered by the provisions under the Special Acts, the Court will have to issue notice to the victim of the crime before dealing with the application seeking release on bail or such other applications as may be necessary, pending trial. If the victim, however, intends to participate in such bail application, the Court is duty-bound to give opportunity of hearing to the victim. The Sessions Court has found fault in the judgment passed by the trial Court for not affording an opportunity of hearing, which finding is contrary to the law laid down by the Hon'ble Supreme Court in the case of Jagjeet Singh (*supra*).

11. The Sessions Court has committed yet another error in interpreting clause (i) of sub-section (1) of Section 437 of the Code. Mr. A.M. Mardikar, the learned Senior Counsel has rightly pointed out that the restriction, if any, is to the offences punishable with "death or imprisonment for life". In other words, he submits that the offences which provides imprisonment upto life will not be governed by such restrictions. I find substance in the aforesaid argument. A careful reading of clause (i) of sub-section (1) of Section 437 of the Code would show that where the offence is punishable with 'death or imprisonment for life', meaning thereby that the Court will have no other option but to impose the punishment of 'imprisonment for life or death', as for the offence punishable u/s 302 of the IPC, the restriction u/s 437 of the Code will apply.

12. In the present case, the offence is punishable upto ten years

or upto life imprisonment, as the case may be. This is not the offence referred to in the provisions u/s 437 of the Code.

13. The learned Senior Counsel has to clarify the position of law on this point, relied upon the judgment passed by the coordinate Bench of this Court, in the case of Ishan Vasant Deshmukh alias Prasad Vasant Kulkarni vs. The State of Maharashtra, reported in 2011 (2) Mh.L.J. 361. The Court has in para no.23 held as under :

*“.....We would reiterate that in cases where the offence is punishable with death or imprisonment for life which is triable exclusively by a Court of Sessions, the Magistrate may, in his wisdom, refrain to exercise the powers of granting the bail and refer the accused to approach the higher Courts unless he is fully satisfied that there is no reasonable ground for believing that the accused has been guilty of an offence punishable with death or imprisonment for life”.*

*In fact, this Judgment would show that it is not that the Magistrate cannot grant bail in cases where the offence is punishable with imprisonment for life, if the offence is triable by the Magistrate. The observations of the Supreme Court that generally speaking if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to Section 437 of the Code. Thus, merely because an offence is punishable with imprisonment for life, it does not follow a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate would be entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life. This Judgment in Pralhad Singh Bhati's case had not been cited before Judge, who decided State of Maharashtra vs. Rajkumar Kunda Swami. Had this Judgment been noticed by the Hon'ble Judge deciding that case, the observation that the Magistrate may not decide*

*an application for bail if the offence is punishable with imprisonment for life would possibly would not have been been made. In view of the observations of the Supreme Court in Pralhad Singh Bhatti's case, it is clear that the view taken by J.H. Bhatia, J. in Ambarish Rangshahi Patnigire vs. State of Maharashtra, reported at 2010(3) Mh.L.J. (Cri) 586 = 2010 ALL MR (Cri) 2775 is in tune with the Judgment of the Supreme Court and therefore, the Magistrate would have jurisdiction to grant bail."*

14. What follows thus, is that the learned Magistrate, as such, is not precluded from releasing the person accused of crime which is punishable with death or imprisonment for life, but will have to record a finding that there are no reasonable grounds for believing that the accused has been guilty of such offence before releasing the accused on bail. The restriction will apply only if there are reasonable grounds for believing that the accused is guilty of such offence. In any case, where the offence is punishable with imprisonment for life and where the offence is triable by the Magistrate, the learned Magistrate will be well within his jurisdiction to release the accused on bail, of course, subject to the facts of each case.

15. In the present case, the learned Magistrate has noted that the investigation is almost complete, the weapons of the crime have been seized, the root cause of the incident is civil dispute, counter cases have been filed. The learned Magistrate, then, applied a well settled principle of law that 'bail is the rule and jail is an exception.' This finding ought not to have been reversed on the basis of the restrictions provided under clause (i) of sub-section (1) of Section 437 of the Code, which does not apply to the facts of the present case. The correct position of law was not properly placed before the learned Sessions Court, which resulted

into erroneous finding. As such, the order impugned, is liable to be set aside. Hence, the following order is passed:-

ORDER

- i) The Criminal Application No.1485/2023 is allowed.
- ii) The impugned order dated 13.10.2023 passed by learned Additional Sessions Judge, Buldana in Cri.Misc. Application No.57/2023 is hereby set aside.
- iii) The orders dated 22.06.2023 and 26.06.2023 passed by the learned Judicial Magistrate, First Class, Deulgaonraja (Court No.2), are restored.

Rule is made absolute in the aforesaid terms.

(ANIL L. PANSARE, J.)