

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3593 of 2023

Shyamchand Mondal

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Kallol Kr. Basu,
Mr. Debapriya Samanta,
Mr. Jannat Ul Firdous,
Mr. Suhotro Palit.

For the State : Mr. Debasish Roy, Ld. PP,
Mr. Bibaswan Bhattacharya.

Hearing concluded on : 05.12.2024

Judgment on : 20.12.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred against an order no. 51 dated 15.07.2023 passed by the learned Judge, Special Court, Lalbagh, Murshidabad in POCSO Case No. 07/2017 arising out of Jiaganj P.S. Case No. 23 of 2017 dated 04.02.2017 under Sections 376/306 of the Indian Penal Code and Section 4 of the POCSO Act, 2012.

2. **Vide order dated 15.07.2023 the learned Trial Court held as follows:-**

*“.....Heard Ld. Special Prosecutor. Since the materials on record attracts prima facie commission of offence U/s 302 of IPC as well which is a higher section than with which the accused Shyamchand Mandal has been charged and facing trial I hereby invoke the liberty granted by the Hon’ble Apex Court in Pradeep Ram Vs State of Jharkhand reported in **(2019) 17 SCC 326** calling upon accused Shyamchand Mandal to appear before the Court on the date fixed (29.09.2023) to answer as to why his earlier bail is not liable to cancellation in terms of the authority reported in **Pradeep Ram vs. State of Jharkhand** reported in **(2019) 17 SCC 326** and same is required to be heard after serving the notice on the defacto complainant.
Inform all concerned accordingly.....”*

3. The Supreme court in the case of **Pradeep Ram Vs. The State of Jharkhand, AIR 2019 SC 3193**, dated **1st July, 2019**, held:-

*“59. After referring to **Anupan J. Kulkarni(supra)** and **Dawood Ibrahim (Supra)**, this court laid down following in paragraph No. 39: -*

“39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub- section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and

investigation is kept pending, benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code.”

60. Learned counsel for the appellant has relied on a Two Judge Bench judgment of this Court in **Mithabhai Pashabhai Patel and Others Vs. State of Gujarat, (2009) 6 SCC 332**. In paragraph No. 17, this Court made following observations:-

“17. The power of remand in terms of the aforementioned provision is to be exercised when investigation is not complete. Once the charge-sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309 which reads as under:

*“309. Power to postpone or adjourn proceedings.— (1) * **
** ”*

62. After having noticed, the relevant provisions of Section 167(2) and Section 309, Cr.P.C and law laid down by this Court, we arrive at following conclusions: -

(i) The accused can be remanded under Section 167(2) Cr.P.C during investigation till cognizance has not been taken by the Court.

(ii) That even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded under Section 167(2) Cr.P.C.

(iii) When cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only under Section 309(2) Cr.P.C.

65. The special Judge in his order has neither referred to Section 309 nor Section 167 under which accused was remanded. When the Court has power to pass a particular order, non-mention of provision of law or wrong mention of provision of law is inconsequential. As held above, the special Judge could have only exercised power under Section 309(2), hence, the remand order dated 25.06.2018 has to be treated as remand order

under Section 309(2) Cr.P.C. The special Judge being empowered to remand the accused under Section 309(2) in the facts of the present case, there is no illegality in the remand order dated 25.06.2018 when the accused was remanded to the judicial custody.....”

4. The Supreme Court in ***Himanshu Sharma Vs State of Madhya Pradesh, Criminal Appeal No (s). _____ of 2024, (Arising Out of SLP (Crl.) No(s). 786 of 2024***, held as follows:-

“11. While cancelling the bail granted to the appellants, the learned Single Judge referred to this Court’s judgment in the case of Abdul Basit (supra). However, we are compelled to note that the ratio of the above judgment favours the case of the appellants. That apart, the judgment deals with the powers of the High Court to review its own order within the limited scope of Section 362 CrPC. Relevant observations from the above judgment are reproduced below :

*“14. Under Chapter XXXIII, Section 439(1) empowers the High Court as well as the Court of Session to direct any accused person to be released on bail. Section 439(2) empowers the High Court to direct any person who has been released on bail under Chapter XXXIII of the Code be arrested and committed to custody i.e., the power to cancel the bail granted to an accused person. **Generally the grounds for cancellation of bail, broadly, are, (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going***

underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days **after the defect is cured by the filing of a chargesheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. However, in the last mentioned case, one would expect very strong grounds indeed.** (*Raghubir Singh v. State of Bihar* [(1986) 4 SCC 481])

16. In *Gurcharan Singh* case [(1978) 1 SCC 118] this Court has succinctly explained the provision regarding cancellation of bail under the Code, culled out the differences from the Code of Criminal Procedure, 1898 (for short "the old Code") and elucidated the position of law vis-à-vis powers of the courts granting and cancelling the bail. This Court observed as under:

"16. Section 439 of the new Code confers special powers on the High Court or Court of Session regarding bail. This was also the position under Section 498 CrPC of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly, under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and

committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions

Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court.”
(emphasis supplied)

17. In this context, it is profitable to render reliance upon the decision of this Court in *Puran v. Rambilas* [(2001) 6 SCC 338]. In the said case, this Court held (SCC p. 345, para 11) that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In *Narendra K. Amin v. State of Gujarat* [(2008) 13 SCC 584], the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle laid down in *Puran* case [(2001) 6 SCC 338] has observed that when irrelevant materials have been taken into consideration by the court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate court and that no review would lie under Section 362 of the Code. In essence, this Court has opined that if the order of grant of bail is perverse, the same can be set at naught only by the superior court

and has left no room for a review by the same court.

20. In the instant case, the respondents herein had filed the criminal miscellaneous petition before the High Court seeking cancellation of bail on grounds that the bail was obtained by the petitioners herein by gross misrepresentation of facts, misleading the court and indulging in fraud. Thus, the petition challenged the legality of the grant of bail and required the bail order to be set aside on ground of it being perverse in law. Such determination would entail eventual cancellation of bail. The circumstances brought on record did not reflect any situation where the bail was misused by the petitioner-accused. Therefore, the High Court could not have entertained the said petition and cancelled the bail on grounds of it being perverse in law.

21. It is an accepted principle of law that when a matter has been finally disposed of by a court, the court is, in the absence of a direct statutory provision, functus officio and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order granting bail cannot be reviewed by the court passing such judgment and order in the absence of any express provision in the Code for the same. Section 362 of the Code operates as a bar to any alteration or review of the cases disposed of by the court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the court.”

12. Law is well settled by a catena of judgments rendered by this Court that the

considerations for grant of bail and cancellation thereof are entirely different. Bail granted to an accused can only be cancelled if the Court is satisfied that after being released on bail, (a) the accused has misused the liberty granted to him; (b) flouted the conditions of bail order; (c) that the bail was granted in ignorance of statutory provisions restricting the powers of the Court to grant bail; (d) or that the bail was procured by misrepresentation or fraud. In the present case, none of these situations existed.”

5. **In the present case:-**

- i) The initial section under which the accused was charged is Section 306 Indian Penal Code.
- ii) The accused had been granted bail.
- iii) **The trial has commenced and there has been no prima facie violation of conditions of bail.**
- iv) The reason for such consideration being that there is a prima facie case under Section 302 IPC.

6. **Investigation has ended. Cognizance taken. Trial has commenced.**

7. **There is no observation that the accused has:-**

- (i) Misused his liberty by indulging in similar criminal activity.
- (ii) Interfered with the course of trial.
- (iii) Attempted to tamper with evidence or witnesses.
- (iv) Threatened witnesses or indulged in similar activities which would hamper smooth conduct of trial.
- (v) There is likelihood of his fleeing to another country.

- (vi) Attempted to make himself scarce by going underground or becoming unavailable to the investigating agency,
 - (vii) Attempted to place himself beyond the reach of his surety, etc.,
8. Nor has he violated the conditions of bail granted.
 9. **Bail is a Rule and Jail is an exception.** This is in line with Article 21 of the Indian Constitution which guarantees the protection of life and personal liberty to all citizens of India. Article 21 of the Constitution of India guarantees the 'right to life and personal liberty' to every individual and no one should be deprived of it except according to the procedure established by law. It guarantees the fundamental right to live with human dignity and personal liberty. As per the fundamental principle of the Universal Declaration of Human Rights a person is assumed to be innocent unless proven guilty. Therefore, no one shall be deprived of personal liberty unless specified by a fair and just procedure. **Bail is an essential element of any criminal justice system, as it guarantees the right to a fair trial for the accused.** Bail is a mechanism that secures liberty to the accused without providing any unjustified benefit to them.
 10. **CRR 3593 of 2023 is allowed.**
 11. The order no. 51 dated 15.07.2023 passed by the learned Judge, Special Court, Lalbagh, Murshidabad in POCSO Case No. 07/2017 arising out of Jiaganj P.S. Case No. 23 of 2017 dated 04.02.2017 under Sections 376/306 of the Indian Penal Code and Section 4 of the POCSO Act, 2012, **is hereby set aside.**
 12. Trial Judge to proceed expeditiously with the trial.

13. All connected applications, if any, stand disposed of.
14. Interim order, if any, stands vacated.
15. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
16. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously after due compliance.

(Shampa Dutt (Paul), J.)