



THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO. 1593 OF 2023

Dr. Rajaram s/o Dhondiba Shendge,
Age 52 years, Occ: Doctor,
R/o: Main Road, Omerga,
Tq. Omerga Dist. Osmanabad.

... **Petitioner**

Versus

The State of Maharashtra.

... **Respondent**

...
Mr. Prashant Prabhakar Giri, Advocate for Petitioner.
Mr. Mukesh K. Goyanka, APP for the Respondent / State.

CORAM : **SANJAY A. DESHMUKH, J.**

DATE : 29th February, 2024.

ORAL JUDGMENT:

1 Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2 The petitioner has challenged an order dated 7th August, 2023 passed below Exhibit-101 in R.C.C. No.22 of 2022 by the learned Judicial Magistrate First Class (Court No.1), Omerga, District Osmanabad. It was an application for relaxation of condition Nos.6 to

9 imposed upon the petitioner at the time of granting bail to him, which read as under:-

- “6] The accused shall attend concerned police station once in a month i.e. on every first Monday till completion of the trial.
- 7] The accused shall attend the trial court on every second and fourth Monday till conclusion of trial beside the regular attendance at the time of evidence recording, framing of charge, thought out the trial.
- 8] The accused shall not change his residential address or leave the place without prior written permission of the trial court.
- 9] No exemption granted to accused until trial over.”

3 The learned counsel for petitioner submitted that in paragraph 8 of the impugned order, the learned Trial Court has observed that, that any condition imposed by magistrate while releasing any accused on bail cannot be modified. The learned Trial Court erred and held that it has no such power to relax the conditions as it is not expressly provided under Section 439 of the Code of Criminal Procedure, 1973 (for short “the Cr.P.C”). The learned counsel for petitioner further submitted that the Trial Court is having implied power under Section 439 (1)(b) of the Cr.P.C. He submitted that the doctrine of implied power is not considered by the learned

Trial Court while rejecting an application for relaxation of conditions of bail as prayed by the petitioner. It is lastly submitted to allow the writ petition by setting aside the impugned order.

4 The learned counsel for the applicant is relying upon the following authorities:-

A) *Income Tax Officer, Cannanore Vs. M.K. Mohamad Kunhi*, (Civil Appeal No.1164 of 1966) dated 11th September, 1968 (*AIR 1969 SC 430*), in which the Honourable Supreme Court held as under:-

“4. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Southland Statutory Construction, Third Edition, Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat's Civil Law, Cushing's Edition, Vol. 1 at page 88 it has been stated :-

"It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it."

"Maxwell on Interpretation of Statutes, Eleventh Edition contains a statement at p.350 that "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdiction data est, ea quoque concessa esse videntur, sine quibus jurisdiction explicari non potuit." An instance is given based on Ex Parte, Martin, (1879) 4 QBD 212 at p. 491 that "where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced.""

B) *Sakiri Vasu Vs. State of U.P. and others*, (Criminal Appeal No.1685 of 2007) dated 7th December, 2007 ***[(2008) 2 Supreme Court Cases 409]***, in which the Honourable Supreme Court in paragraph Nos.18, 19 and 20 held as under:-

“18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is

quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his 'Statutory Construction' (3rd edn. page 267):-

"If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission".

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein."

C) *Asgar Yusuf Mukadam Vs. State of Maharashtra*, (Criminal Writ Petition No.1438 of 2000) dated 2nd August, 2004 (***2004 Cri.L.J. 4312***), in which the Division Bench of this Court in paragraph No.27 held as under:-

"27. It is to be remembered that, as rightly submitted by the learned Advocate for the petitioners, the cardinal principle of criminal jurisprudence is that a person accused of an offence is deemed to be innocent until he is proved guilty. The provisions of law, as they stand comprised, under Section 167 of the Code of Criminal Procedure, therefor, discloses implicit power in favour of the Magistrates and the courts before whom the accused is produced for remand or continuation of detention of the accused in custody, to order the facility of home food on being requested for by such accused and on being

satisfied about the need for grant of such facility.

Undoubtedly, the respondents would be entitled to take appropriate steps to ensure that the drugs, messages, weapons, etc. are not transported inside the jail under the guise of supplying home food to the under-trials, and, in case, any such mischief is brought to the notice of the Court, nothing would prevent the Court or the Magistrate either to refuse such facility or even to recall the order already passed granting such facility, albeit, after hearing the concerned accused and in extreme urgency, even ex parte subject to confirmation after hearing the accused.”

(Emphasis supplied)

D) *Savitri Vs. Govind Singh Rawat*, (Special Leave Petition (Criminal) No.1028 of 1984) dated 9th October, 1985 *[(1985) 4 Supreme Court Cases 337]*, in which the Honourable Supreme Court in paragraph No.6 held as under:-

“6. In view of the foregoing it is the duty of the Court to interpret the provisions in Chap. IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed

of finally. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim 'ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist.) Vide Earl Jowitt's Dictionary of English Law 1959 Edn. P. 1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the

grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Courts constituted under the said Act.”

E) *Re Police Strategy for Grant of Bail, 2023 SCC OnLine 483*, the order dated 31st January, 2023 passed in SMWP (Criminal) No.4 of

2021, in which the Honourable Supreme Court held as under:-

“10. With a view to ameliorate the problems a number of directions are sought. We have examined the directions which we reproduce hereinafter with certain modifications:

- “1) ...
- 2) ...
- 3) ...
- 4) ...
- 5) ...
- 6) If the bail bonds are not furnished within one month from the date of grant bail, the concerned Court may suo moto take up the case and consider whether the conditions of bail require modification/relaxation.
- 7) ...”

5 The learned APP for the State submitted that the Trial Court has imposed stringent conditions in order to secure the presence of the petitioner and there is no any illegality in the impugned order. The Trial Court has no such power to relax the said conditions. The Trial Court has rightly observed that Section 439 of the Cr.P.C. only empowers the Sessions Court and High Court to relax the said conditions and not to the Court of Judicial Magistrate First Class. The condition No.8 is reasonable and correct about intimation as to changing of the residential place by the petitioner. It is lastly prayed to dismiss the petition with costs.

6 Perused the impugned order as well as the order by which stringent conditions were imposed while granting bail to the petitioner. Section 439 of the Cr.P.C. does not expressly empower the J.M.F.C. Court to modify and relax the conditions of bail. However, when any Court is empowered to pass an order for bail, it cannot be accepted that to achieve the object of justice Court cannot exercise power or modify the bail order and the relax stringent conditions in changed circumstances. The law laid down by the Honourable Supreme Court in *Income Tax Officer, Cannanore* (supra), clarifies that it is duty of the Court to apply the law, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made. Further, in *Sakiri Vasu* (supra), the Honourable Supreme Court has also guided that, if these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely to be defeated by a most insignificant omission. Thus, by necessary implication the Court of Judicial Magistrate First Class is having implied power to relax the conditions, which are imposed by it while granting bail. The Honourable Apex Court issued guidelines in the case of *Ray Policy Strategy for Grant of Bail, reported in 2023 SCC Online SC 483* and by guideline No.6, all the Courts are directed to consider whether the conditions of bail require modification/ relaxation

or not. However, this empowering case law is not followed by the learned J.M.F.C.

7 The ultimate goal of Law and Court is to give justice. The Court has to consider these aspects of giving justice in three different circumstances:-

- i) When the Court is acting as a Court of law i.e. when the law is of a mandatory nature and discretion is not vested in the Court, it is duty of Court to adhere to the law, not to mould the law and exercise discretion whatever repercussion of it may be.
- ii) When the Court is acting as Court of justice i.e. when discretion is vested by the Law, the Court, may in order to achieve the object of justice, exercise judicial discretion liberally without causing injustice to other side and protect the legal rights.
- iii) When there is no law i.e. express or implied or the law is silent then Court has to think and decide that issue rationally and give justice. In such exceptional fact situation, the Court has to keep in mind that its rational approach reaching towards object of justice is the law. It is because the legislature cannot

predict everything. The legislature cannot draft minute details. However, fact situation of the case are decisive. However, inherent power under Section 482 of the Cr.P.C. and plenary power under Article 142 of the Constitution of India shall not be exercised. The Court must bear in mind that basic principle of criminal trial is that there must be defined crime and prescribed punishment. Therefore, when there is no law Court cannot use its rationality against the accused as he is protected under Article 20 of the Constitution of India. However, for giving justice to the accused such rational approach is essential if there is no law. In such fact situation, Court must bear in mind that justice to the parties is prime, reasonable and rational object of the law. Thus, when there is no law, rational approach of the Court is law in the exceptional circumstances. The Court can in order to achieve object of justice, rationally suiting to the facts of the case decide the rights and liabilities provided, injustice should not be caused to any party.

8 While imposing conditions upon this petitioner, no such convincing reasons were given as to why the petitioner shall attend the Trial Court every second and fourth Monday till the conclusion of trial even though the date of case is not scheduled. Further, there are

no such acceptable reasons as to why the petitioner shall attend the police station once in a month i.e. on every first Monday till completion of the trial and why no exemption shall be granted to the accused until the trial is over. Reasons are soul of the judgment. It is jurisprudence of the judgment and order writing that convincing reasons must be given not only about factual and legal aspects, but about the final order i.e. operative part of the judgment or order as to why it is made. Thus, without giving reasons the stringent conditions were imposed upon the petitioner by the J.M.F.C. Court. It failed to consider that such conditions must be reasonable suiting to the facts of the case with justified reasons. As per definition of word “proved” Court is expected to be reasonable i.e. ordinary prudent man and not more than it while thinking and acting judicially.

9 While passing an impugned order, the doctrine of implied power was not considered by the Trial Court. The Trial Court grossly erred while rejecting application Exhibit-101 and exercise implied power under Section 439 (1)(b) of the Cr.P.C. Therefore, those stringent conditions deserve to be cancelled. The impugned order therefore, deserves to be set aside. The application Exhibit-101 deserves to be partly allowed, except condition No.8. The writ petition deserves to be allowed. Hence, the following order:-

ORDER

- I. The criminal writ petition is allowed in terms of prayer clauses (B) and (C).
- II. However, it is clarified that condition No.8 that applicant shall communicate to the Trial Court his new address if he is changing his resident, is not cancelled by this Court.
- III. Rule is made absolute in above terms.

10 The Registrar (Judicial) of this Court to circulate copy of this judgment to all the Judges of District Judiciary of State of Maharashtra.

[SANJAY A. DESHMUKH, J.]

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