

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.491 OF 2023**

Rajesh Thomas Menzes,
Age 51, Occu – Business,
Rajsmith House, Gaunighar,
Manikpur Chowk, Vasai Road (W),
Tal. Vasai, Dist. Palghar

... Applicant

versus

1. The State of Maharashtra,
EOW Mira – Bhayander – Vasai – Virar

2. David Fracis D’Souza,
Harmony, Nadai Wadi, Near Waslai,
PO Vasai, Dist. Palghar

... Respondents

Mr. Bhomesh Bellam with Mr. Tejas Kothalikar, for Applicant.
Mr. S.R.Aagarkar, APP for State.
Mr. Ashley Cusher, for Respondent No.2.

CORAM: N.J.JAMADAR, J.

DATE : 24 JANUARY 2024

ORDER :

1. Heard the learned Counsel for the parties.
2. The legality, propriety and correctness of an order dated 11 May 2023 passed by the learned Additional Sessions Judge, Vasai in Criminal Misc. Application No.123 of 2022 preferred by the Respondent No.2 whereby the pre-arrest bail granted to the applicant by an order dated 10 August 2021 passed in ABA No.552 of 2021

came to be cancelled and a non-bailable warrant issued against the applicant – accused, is assailed in this application.

3. Shorn of superfluities, the background facts can be stated as under :

3.1 Santosh V. Soans - first informant, lodged a report with Manikpur Police Station with the allegations that he was induced by the applicant and the co-accused Amit Jain and Yogesh Bhalerao to invest an amount of Rs.10 Lakhs in the scheme floated by Aaj Edu Plus Consultancy Pvt. Ltd. (the financial establishment), of which Amit Jain and Yogesh Bhalerao were the directors, by making a false representation of lucrative returns. Later, the Respondent No.2 and other investors were also defrauded in similar fashion to the tune of Rs. 8 Crores approximately. The applicant was working as a Sales Manager at the said company and had made representations that if the first informant and investors invested the amount with the said financial establishment, they would earn lucrative returns. Neither the principal amount was repaid, nor return thereon, as promised. Realizing the fraud, the first informant lodged a report leading to registration of C.R.No.195 of 2021 for the offences punishable under Sections 420, 406 read with Section 34 of the Indian Penal Code and Sections 3 and 4 of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999.

3.2 Eventually, the co-accused Amit was arrested in the month of September 2021 and Yogesh was arrested in the month of October 2021.

3.3 The applicant preferred an application for pre-arrest bail. By an order dated 10 August 2021, the learned Additional Sessions Judge, Vasai, was persuaded to grant pre-arrest bail to the applicant ascribing reasons. It appears that the investigation came to be transferred to the Economic Offences Wing. Post completion of investigation, chargesheet came to be filed on 8 November 2021.

3.4 The Respondent No.2, who claimed to be one of the investors, preferred an application for cancellation of pre-arrest bail on 8 September 2022. It was, inter alia, alleged that the applicant had played a major role in the fraud and was also the beneficiary thereof. The Applicant falsely claimed to be the victim of the fraud. Thus, the pre-arrest bail granted to the applicant was required to be cancelled.

3.5 By the impugned order, the learned Additional Sessions Judge was persuaded to allow the said application preferred by the Respondent No.2 and cancelled the order of pre-arrest bail. The learned Additional Sessions Judge was of the view that while seeking pre-arrest bail, the applicant had suppressed many material facts. Had those facts, which were unearthed by the vigilant investors, been brought to the notice of the Court, the Court would not have granted pre-arrest bail to the applicant. The learned Additional Sessions Judge was of the view that a thorough investigation regarding the role of the applicant and the intimate transactions between the said company and SRK, entity of the applicant, was required, and, therefore, the

Investigating Officer must carry out further investigation under Section 173(8) of the Code of Criminal Procedure, 1973. Holding thus, the bail was cancelled.

4. An affidavit in reply is filed on behalf of Respondent No.2. An endeavour is made to support the impugned order. Co-accused are stated to be in custody. Yet the applicant, who is the prime beneficiary of the alleged fraud, is at large. The applicant was a prime beneficiary and had obtained the order of pre-arrest bail by falsely claiming to be the victim of the alleged fraud and, therefore, the learned Additional Sessions Judge was fully justified in cancelling the order of bail, as it was obtained by suppression of facts and active mis-representation.

5. I have heard Mr. Bellam, learned Counsel for the applicant, Mr. Aagarkar, learned APP for the State, and Mr. Ashley Cusher, learned Counsel for Respondent No.2, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record, averments in the application, reply thereto and impugned order.

6. Learned Counsel for the applicant submitted that the learned Additional Sessions Judge committed a manifest error in cancelling the order of pre-arrest bail after it was fully acted upon and that too on the merits of the matter and not on account of any supervening circumstance. The learned Additional Sessions Judge could not have reviewed his own order on merits. It was not a case where on account of breach of any condition of bail or any other supervening circumstance, the learned

Additional Sessions Judge could have exercised jurisdiction under Section 439(2) of the Code. On the contrary, the learned Additional Sessions Judge delved into the merits of the matter afresh and cancelled the order of bail, which is impermissible in law. If the Respondent No.2, or for that matter the State, was aggrieved by the order of grant of bail on merits, appropriate course would have been to approach the High Court seeking cancellation of bail. The learned Additional Sessions Judge could not have reviewed his own decision on merits, was the thrust of the submission on behalf of the learned Counsel for the applicant.

7. To lend support to the aforesaid submissions, Mr. Bellam, placed a strong reliance on a decision of the Supreme Court in the case of **Abdul Basit @ Raju and Ors. V/s. Mohd. Abdul Kadir Chaudhary and Anr.**¹.

8. Learned APP fairly submitted that the learned Additional Sessions Judge seems to have exceeded the jurisdiction.

9. Mr. Cusher, learned Counsel for Respondent No.2 – original applicant in Criminal Misc. Application No.123 of 2022 countered the submissions on behalf of the applicant. It was urged that a clear case of fraud was made out against the applicant. Despite being the beneficiary of the alleged fraud, the applicant had falsely claimed that he was the victim of machinations of the co-accused. It was submitted that as against the investment of Rs.94 Lakhs, the applicant and his family members

1 (2014) 10 SCC 754

had received huge profits to the tune of Rs.2.47 Crores. There is material to indicate that false representation to lure unsuspecting investors were made by SRK, a family entity of the applicant. In the circumstances, having regard to the number of persons who were duped and the amount they were fraudulently defrauded, the learned Additional Sessions Judge committed no error in cancelling the bail and ordering further investigation. Therefore, the application does not deserve to be entertained.

10. A pivotal question that crops up for consideration is whether the learned Additional Sessions Judge was justified in cancelling the pre-arrest bail granted to the applicant by invoking the power under Section 439(2) of the Code on the premise that had the material which subsequently emerged been produced before the Court, he would not have granted pre-arrest bail ?

11. At the outset, few facts deserve to be noted. The order dated 10 August 2021 granting pre-arrest bail to the applicant was a reasoned order, touching the merits of the matter. The learned Additional Sessions Judge had referred to the allegations in the FIR, prima facie role attributed to the applicant, the material that had then emerged, the contention of the applicant and the opposition to the prayer for bail. The learned Additional Sessions Judge, upon consideration of the said material, was inclined to grant pre-arrest bail to the applicant. Post the said order, it seems, the chargesheet came to be lodged. The applicant appeared before the jurisdictional Court and furnished fresh bail bonds.

12. The learned Additional Sessions Judge while cancelling the said order of pre-arrest bail held that the applicant had obtained the pre-arrest bail by suppressing facts and had those facts been presented before the Court, when the pre-arrest bail was granted, he would not have exercised the discretion.

13. Section 439(2) of the Code of Criminal Procedure, 1973, which empowers the High Court and the Court of Session to cancel the bail and commit a person to custody, reads as under :

“A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

14. On its plain reading, sub-Section (2) of Section 439 vests discretion in the High Court and the Court of Session to cancel the order of bail and direct arrest of a person. The discretion, as is evident, is vested in the higher echelon of the Courts. Though the circumstances in which the High Court or the Court of Session would be justified in ordering cancellation of bail are not explicitly spelled out, yet, it is well recognized that the said power has to be resorted to sparingly and in deserving cases only. The cancellation of bail stands on a different footing than the rejection of the bail at the first instance. There must be strong and substantive reasons to arrest a person who is set at liberty by admitting him to bail. Thus, sub-section (2) of Section 439 does not vest an unfettered discretion in the High Court or the Court of Session to cancel the bail.

15. When the question is of exercise of the power under Section 439(2) by the same Court, to what extent the Court can delve into the merits of the matter which it had already considered, is at the heart of the controversy. In this connection, the provisions contained in Section 362 of the Code, which proscribe review by criminal Court, also deserve to be noted. Section 362 of the Code reads as under :

“362. Court not to alter judgment : - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

16. Evidently, Section 362 begins with the words ‘save as otherwise provided by this Code or by any other law for the time being in force’. Thus, whether sub-section (2) of Section 439 renders the order of cancellation of bail totally immune from the challenge that the cancellation of bail amounts to substantive review and, thus, proscribed under Section 362 of the Code, deserves consideration.

17. In the case of Gucharan Singh and Ors. V/s. State (Delhi Administration)² after noting the departure which the Code of Criminal Procedure, 1973 has made from the Code of 1898 in the matter of cancellation of bail, the Supreme Court elucidated the law 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

2 (1978) 1 SCC 118

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 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 as 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-a-vis the

High Court.”

18. Ordinarily, the bail can be cancelled on the ground of interference or attempt to interfere with the due course of administration of justice and abuse of liberty granted to the accused. In the case of **Raghubir Singh and Ors. V/s. State of Bihar**³ the Supreme Court expounded the grounds on which the cancellation of bail may be justified, as under :

“22.....Generally the grounds for cancellation of bail, broadly, are interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of sureties. He may abuse the liberty granted to him in indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution is 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. In the last mentioned case, one would expect very strong grounds indeed.

3 (1986) 4 SCC 481

19. The Courts have recognized the distinction between two situations, namely, cancellation of bail on the grounds which are in the nature of supervening circumstances, which owe their provenance to the acts, events or conducts, post the passing of the order of bail, particularly that of the accused, and the cancellation of bail on the merits of the matter, in the sense that the order of bail is vulnerable for either being perverse or otherwise legally unsustainable.

20. In the case of **Puran V/s. Rambilas**⁴ the Supreme Court held that the concept of setting aside the unjustified illegal or perverse order is absolutely different from cancelling the order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation.

21. In the case of **Ranjit Singh V/s. State of M.P.**⁵ the Supreme Court reiterated the distinction in the following words :

“19.....There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court.”

22. In the case of **Abdul Basit (supra)**, on which a very strong reliance was placed on behalf of the applicant, the Supreme Court considered the inter play

4 (2001) 6 SCC 338

5 (2013) 16 SCC 797

between the provisions contained in Section 439(2) and Section 362 of the Code in the matter of cancellation of bail by the same Court on the ground that the accused had obtained bail by misrepresentation of facts. The observations of the Supreme Court in paragraphs 17, 19, 20 21 and 26 are material and, hence, extracted below :

“17. In this context, it is profitable to render reliance upon the decision of this Court in *Puran v. Rambilas*⁶. 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*⁷, 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* 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.

19. Therefore, the concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused’s misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the aforesaid directions

6 (2001) 6 SCC 338

7 (2008) 13 SCC 584

would present before us that an order granting bail can only be set aside on grounds of being illegal or contrary to law by the court superior to the court which granted the bail and not 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.

26. In the instant case, the order for bail in the bail application preferred by the accused-petitioners herein finally disposes of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Code, the High Court becomes functus officio and Section 362 of the Code applies herein barring the review of judgment and order of the Court granting bail to the petitioner-accused. Even though the cancellation of bail rides on the

satisfaction and discretion of the court under Section 439(2) of the Code, it does not vest the power of review in the court which granted bail. Even in the light of fact of misrepresentation by the petitioner-accused during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition.”

23. The Supreme Court has in terms held that if the order of grant of bail is perverse, the same can be set at naught only by the superior Court and not by the same Court, upon review of the matter. The order of granting bail can only be set aside on the ground of being illegal or contrary to the law by the court superior to the court which granted the bail and not by the same Court.

24. In the aforesaid case also, the High Court had cancelled the bail on the ground that the Petitioner therein had indulged in gross mis-representation of facts and fraud, and thereby misled the Court. Since the circumstances brought on record did not reflect any situation where the liberty of bail was misused by the accused, the Supreme Court held that the High Court could not have entertained the said Petition and cancelled the bail on the grounds of it being perverse in law. It amounted to review of its earlier judgment.

25. On the aforesaid touchstone, reverting to the facts of the case, the learned Additional Sessions Judge, it appears, was persuaded to cancel the bail on the ground that there was suppression of facts and the applicant had not placed before the Court the correct facts and the claim of the applicant that he was the victim and not

the beneficiary of the fraud, was found to be untenable in view of the material placed on record by the interveners-victims. The correctness of these observations need not be delved into in this application. What the learned Additional Sessions Judge found upon reconsideration of the matter may have substance. The question is whether the Court of Session could have reappraised the material and drawn a different conclusion ?

26. It is not a case that the applicant had abused the liberty of bail. Nor is it a case that the investigating agency had carried out further investigation and filed a supplementary chargesheet. On the contrary, the learned Additional Sessions Judge directed the investigating agency to thoroughly investigate the matter and file a report under Section 173(8) of the Code.

27. In the circumstances, an inference becomes inescapable that on the basis of the very same material, which was then available, the order of bail came to be cancelled by taking a view that the applicant had not brought correct facts before the Court. Undoubtedly, suppression of facts and fraud erode the sanctity of the any order. At the same time, the extent to which a person seeking bail is required to make disclosure is a matter which requires consideration. The allegations of suppression are, therefore, required to be judged from the perspective of the right of accused against self-incrimination or to maintain silence.

28. Viewed through this prism, in my view, the learned Additional Sessions Judge exceeded the jurisdiction in cancelling the bail by delving into the merits of the matter afresh. Appropriate course for the aggrieved party or the State was to approach the High Court seeking cancellation of bail.

29. I am, therefore, inclined to hold that the application deserves to be allowed. It is, however, necessary to clarify that the aggrieved party would be at liberty to seek cancellation of bail by moving the High Court.

30. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The impugned order dated 11 May 2023 stands quashed and set aside and the order of pre-arrest bail dated 10 August 2021 and the subsequent proceedings admitting the applicant to bail, stand restored.

(iii) It is clarified that the aggrieved party or the State may seek cancellation of bail by approaching the High Court and this Court may not be understood to have delved into the merits of the prayer to cancel the bail of the applicant.

Application disposed.

(N.J.JAMADAR, J.)