

08.01.2025
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CRR 5061 of 2024
in
CRM(A) 3881 of 2024
with
CRM (A) 3882 of 2024

Mr. Arnab Chatterjee
Mr. Dipankar Guha
Ms. Riya Das

....for the accused-opposite party

Mr. Saryati Datta
Mr. Rajashree Tah

.... for the State (in CRM (A) 3881/2024)

Mr. S. S. Imam
Ms. Sana Naaz

..... for the State (in CRM (A) 3882/2024)

1. Affidavits have been filed by the accused in response to the Rule seeking cancellation of bail.

2. Factual matrix giving rise to the Rule is as follows :
Akmal Sk. was assaulted by miscreants in front of the godown of one Nasir. While he was being taken to the hospital he made an oral dying declaration before Tofijul Sk., Kabil Sk. and Sk. Akhtar. In the oral dying declaration, Sintu Sk @ Sentu Sk., Hibjur Rahaman, Barkat Ali, Md. Ashiruddin Sk. and Nuhu Sk. And others were mentioned as the assailants. However, names of Estab Ali and Seikh Israil @ Israil had not been taken by the deceased in his dying statement. Accordingly, they had been granted pre-arrest bail. Without examining the roles of the aforesaid accused persons vis-à-vis Estab Ali and Seikh Israil @

Israil (who had been granted anticipatory bail), a co-ordinate Bench granted anticipatory bail to them on parity. This issue was noticed by this Bench while dealing with the prayer for pre-arrest bail of another set of accused and Rule was issued calling upon the aforesaid accused why their bail ought not to be cancelled.

3. Mr. Chatterjee, learned Counsel for the accused contends the co-ordinate Bench had looked into the case diary including the purported dying declaration and granted pre-arrest bail to his clients. After grant of pre-arrest bail his clients did not misuse liberty and have been regularly attending Court. In the event the order granting pre-arrest bail is perverse the same ought to have been assailed by the State before the superior forum. On this score bail cannot be cancelled by another Bench of this Court.

4. Learned Counsel for the State submits oral dying declaration implicate the accused persons and there is no reference to this incriminating fact in the order granting pre-arrest bail to them.

5. A Court while granting pre-arrest bail must take into consideration all relevant circumstances including the nature and gravity of offence, evidence collected in support of the allegation and the role played by each accused in the crime. When offence is committed by a number of persons, the last criteria i.e. role of each accused *qua* the crime assumes importance.

6. In ***Mahadev Meena vs Praveen Rathore and anr***¹

Supreme Court held bail on parity ought not to be mechanically granted but must be examined on the anvil of totality of circumstances including the role of each accused. Orders granting pre-arrest bail to the accused persons in respect of whom the Rule has been issued do not advert to the incriminating circumstance i.e. their implication in the oral dying declaration which sets them apart from co-accused viz. Estab Ali and Seikh Israil @ Israil with whom they had claimed parity.

7. When this Bench was called upon to mechanically apply the rule of parity in respect of another set of accused, we declined to do so and issued Rule for cancellation of bail to those accused who are named in the dying declaration.

8. However, Mr. Chatterjee, rightly indicates that the order granting pre-arrest bail has not been assailed by the State before a superior forum on the score of perversity.

9. In ***Himanshu Sharma vs. State of Madhya Pradesh***² the Apex Court highlighted the distinction between cancellation of bail due to supervening circumstances and setting aside a bail order on the ground of perversity. While the former falls within the domain of the same court entertaining a prayer for cancellation the latter requires to be agitated before a superior forum. The grounds on which a bail order may be

¹ (2021) 17 SCC 788

² (2024) 4 SCC 222

cancelled by the same Court was succinctly ennumerated in paragraph 11 of the said judgment :

“11. 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.”

10. Applying the ratio to the facts of the case we are constrained to hold our *suo motu* jurisdiction to invoke cancellation powers do not extend to setting aside the orders of pre-arrest bail granted to Sintu Sk @ Sentu Sk., Hibjur Rahaman, Barkat Ali, Md. Ashiruddin Sk. and Nuhu Sk. on the score of non-consideration of an incriminating fact viz. implication in the dying statement of the deceased.

11. It is open to the State to assail the said orders before the appropriate forum in accordance with law.

12. With these observations Rule is discharged.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)