

(1993) 09 BOM CK 0040

In the Bombay High Court

Case No : Criminal Application No. 2602 of 1993

C.P. Nangia, Assistant Collector of Customs, Bombay

APPELLANT

Vs

Omprakash Aggarwal and another

RESPONDENT

Date of Decision : 22-09-1993

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 167, 169, 170, 173, 2
Customs Act, 1962 — Section 108, 135
Penal Code, 1860 (IPC) — Section 34, 504

Citation : (1994) CriLJ 2160

Hon'ble Judges : P.S. Patankar, J

Bench : Single Bench

Advocate : M.K. Patwardhan, for the Appellant; Smt. K.D. Randive, Assistant Public Prosecutor, V.P. Vashi and V.V. Vashi, for the Respondent

Judgement

1. Rule. The learned Advocates for the Respondents waive notice. By consent heard forthwith.

2. The Respondent No. 1 who is a Managing Director is alleged to have been involved in offences punishable u/s 135(1)(a)(i) of the Customs Act, 1962 and Section 5 of the Imports and Exports (Control) Act, 1967 for not exporting the goods worth about Rs. 17 lakhs even though he was under an obligation to export the same as equivalent raw material was imported without payment of import duty. Statement of Respondent No. 1 was also recorded u/s 108 of the Customs Act.

3. Respondent No. 1 came to be arrested on 27-8-1993 and produced on the same date before the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay and remanded till 28-8-1993. On 28-8-1993, the learned Magistrate considering all the facts and circumstances and by reasoned order remanded Respondent No. 1 to judicial custody till 3-9-1993. The bail plea made by Respondent No. 1 was rejected. This was done so as to give some time to the

investigating agency to complete investigation and respondent No. 1 should not create hurdles by remaining free.

4. On 30th August, 1993, an application was filed by Respondent No. 1 for releasing him on bail. The same was taken up by the Chief Metropolitan Magistrate, Bombay for hearing on 1-9-1993 and the Respondent No. 1 came to be released on bail. It was observed as follows :-

"I have given serious consideration to the facts of the case and submission made by both sides. It is almost an admitted position that the investigation in this case is going on since the first week of August, 1993 and the statement of the accused are recorded. It appears that accused had attended the office several times and the correspondence is exchanged between the parties. In view of this I am of the opinion that the accused can be released on imposing certain conditions on him."

5. As far as the merit of the matter is concerned, I am declining the interfere with the impugned order. Considering the allegations made against Respondent No. 1, the fact that his statement is already recorded u/s 108, panchanama is effected and books of accounts are seized, much of the investigation is over and the respondent No. 1 has admittedly complied with the conditions of bail, it is not necessary to set aside the impugned order.

6. The learned Advocate appearing for the petitioner, Shri M. K. Patwardhan, then raised two points. The learned Advocate first submitted that the Metropolitan Magistrate, 32nd Court, Esplanade, Bombay, has passed a well-reasoned order on 28-8-1993 while remanding the Respondent No. 1 to judicial custody till 3-9-1993 and rejecting his bail plea. In the face of such an order, the learned Metropolitan Magistrate ought not to have passed the impugned order. He submitted that the Court of Metropolitan Magistrate is not subordinate Court and, therefore, the Chief Metropolitan Magistrate ought not to have interfered with the order passed by the Metropolitan Magistrate. He pointed out that this point was raised before the Chief Metropolitan Magistrate. However, he has not dealt with the same and simply brushed it aside.

7. Secondly, he submitted that a prayer was made to the Chief Metropolitan Magistrate that effect to the impugned order dated 30-8-1993 be given from 3-9-1993. The learned Judge has committed an error in rejecting the same on the ground that there is no provision to that effect in the Criminal Procedure Code.

FIRST SUBMISSION :-

8. In my opinion, it was highly irregular on the part of the Chief Metropolitan Magistrate to take up the matter in the face of the earlier order passed by the Metropolitan Magistrate, 32nd Court, Esplanade, Bombay who is not subordinate to the Chief Metropolitan Magistrate so far as the judicial work is concerned. It is of co-ordinate jurisdiction. The propriety required that the application filed by

Respondent No. 1 should have been directed to be heard by the Metropolitan Magistrate, 32nd Court, Esplanade, Bombay. It is not possible for me to understand the reason for interference on the part of the Chief Metropolitan Magistrate at that stage. This is quite disturbing. Therefore, I am constrained to pass some order in that respect.

SECOND SUBMISSION :-

9. This is the contention which has been mainly pressed and argued by the learned Advocates. The question is whether the Magistrate can either stay the operation of the bail order for a few days or make the same operative from the future date to enable a party to approach the higher Court. The learned Advocate for the petitioner submitted that the Magistrate possesses such power and can pass such order for good reasons. The learned Advocate for Respondent No. 1 submitted that the Magistrate does not possess such power under Criminal Procedure Code.

10. The learned Advocate for the petitioner first relied upon Section 437 of the Criminal Procedure Code in support of his submission. The said section deals with rearrest of an accused and committing him to custody by the Court which has released him on bail under sub-section (1) or sub-section (2) of Section 437. In my opinion, it is not possible from the said sub-section to spell out that such a power is possessed by the Metropolitan Magistrate. The learned Advocate for the petitioner relied upon certain observations of the Apex Court made in *Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat*, . They are to the effect that there is no finality attached to an order passed by designated Court granting or refusing bail. Such an application for bail can always be renewed from time to time. In my opinion, these observations are to no help to the petitioner.

Similar is the position regarding *Nazeem Vs. Asstt. Collector of Customs and another*, (Judgment of Single Judge of this Court). It is again observed orders granting bail and imposing terms are all interim orders capable of modification. The learned Advocate for the petitioner then relied upon the Division Bench Judgment reported in 1986 Cri LJ 213, *Bombay Municipal Corporation v. Suresh U. Gupta*. In the said case, an order staying criminal prosecution for an indefinite period pending civil suit was passed. It came to be held that the said order cannot be treated as an interlocutory order and hence bar u/s 397(2) of the Criminal Procedure Code will not apply to such an order. Again this is of no help or assistance to the petitioner. The learned Advocate for the petitioner relied upon *Raghubir Singh and Others Vs. State of Bihar*, . In the said case, accused was released on bail under the proviso to Section 167(2). The question arose whether by filling a charge-sheet or by remand to custody u/s 309(2) the bail can be cancelled. It was held that bail can be cancelled only u/s 437(5) of Section 439(2). It was observed "Generally the grounds of 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". Again this has nothing to do with the point

involved in the present case.

11. The learned Advocate for petitioner then relied upon Section 309(1) and submitted that if entire proceedings can be stayed by the Magistrate or trial Court then certainly in the interest of justice he can stay the order of bail which is nothing but a part of enquiry. The definition of "inquiry" as contained in Section 2(g) points out that except trial other proceedings taken by the Magistrate or Court is an inquiry. The apex Court in para 26-A in the judgment reported in *Ratilal Bhanji Mithani Vs. State of Maharashtra and Others*, , *Ratilal Bhanji Mithani* observed that the trial in a warrant case starts with the framing of charge; prior to it proceedings are only an inquiry. The inquiry has thus wide connotation and includes every inquiry other than trial. In support of this contention he relied upon the judgment of the Apex Court reported in *State of Gujarat Vs. Mohanlal Jitmalji Porwal and Another*, , *State of Gujarat v. Mohanlal J. Porwal*. In the said case, the request for adducing additional evidence by the prosecution was rejected on the ground of delay. The apex Court held that the view was incorrect and observed as follows :-

"The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the Community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The Community or the State is not a persona non grata whose cause may be treated with disdain. The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on persons profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear and criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest."

Similarly, reliance is also placed on another decision of the apex Court in *K.M. Mathew Vs. State of Kerala and another*, In the said case, process was issued on a private complaint which was filed u/s 504 read with S. 34 I.P.C. The accused was a Chief Editor of Newspaper. Thereafter appeared before the Magistrate and pointed out the cause why the proceedings should be dropped. The question arose whether the Magistrate can exercise such a power and it was held that there is no bar to drop the proceedings against any of the accused persons. If the complaint does not prima facie disclose any offence against him. In para 8, the apex Court observed as follows :-

"8. It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No

specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

12. As against this, the learned Advocate for respondent No. 1 contended that liberty of an individual is involved in this and there is urgency as far as the bail matters are concerned and, therefore, the Magistrate cannot pass an order staying the same for a few days or staying the operation of the same for a particular period. It is not possible to accept this. No doubt, as far as bail matters are concerned, there is urgency and liberty of an individual is involved. But it cannot be accepted that for good reasons the Magistrate is divested of such a power because of this. The learned Advocate for the respondent No. 1 then contended that such a power can only be exercised by the High Court u/s 482, Cr.P.C. or Articles 226/227 of the Constitution of India or by the Supreme Court under Art. 136 and it cannot be exercised by the Magistrate or trial Court. He submitted that the trial Court has no inherent power as possessed by this Court or the apex Court. He also submitted that if stay is granted it amounts to practically reviewing the order passed as the accused is required to remain in detention. In support of this, he first relied upon, *Bindeshwari Prasad Singh Vs. Kali Singh*, . The question involved was whether a Magistrate can recall a case disposed of by judicial order. In that connection, it came to be held that there is no provision in the Criminal Procedure Code empowering the Magistrate to review or recall a judicial order passed by him. It was held that there is no inherent power in the subordinate Courts. Similarly, in this connection, reliance is placed in *Maj. Genl. A.S. Gauraya and Another Vs. S.N. Thakur and Another*, . Again in the said case, the complaint came to be dismissed for default and question was whether the Magistrate is having inherent power to review this order of dismissal and restore the same. In that connection, it came to be observed that "So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction to restore the case." This was in turn based on *Bindeshwari Prasad Singh Vs. Kali Singh*, . For this very contention, the learned Advocate for respondent No. 1 relied upon the judgment of the Single Judge of this Court (Saldanha, J.) dated 28-12-1990 in Criminal Application No. 3130 of 1990. In the said case, a prayer was made for stay of the order passed by this Court granting bail and it was rejected observing that no stay ought to be granted in such cases of granting bail. As far as this case is concerned, this does not amount to the saying that the Court does not possess the power. These are general observations or expressions and no inference can be drawn that power of Court is excluded. It is an error to spell out from this that the learned Judge wanted to say that there is no power. The judgment of another Judge of this Court reported in *Kishanlal Dayama Vs. Parwatibai and Others*, and

of the single Judge of Allahabad High Court reported in Rameshwar Prasad Vs. State, are also to the effect that Magistrate does not possess inherent power. However, this is not a case of review or exercise of inherent power and therefore reliance placed on the above mentioned judgments by learned Advocate for respondent No. 1 is misplaced. They are of no help to him.

13. Then in State of Gujarat Vs. Shah Lakhamshi Umarshi and Another, the learned Magistrate called for charge-sheet from the police officer and the scheme of Sections 169, 170 and 173 of the Criminal Procedure Code came to be considered. It was observed that there is no provision in the Criminal Procedure Code expressly conferring on the Magistrate such power to call for charge-sheet. It is also held that such power cannot be implied. However, this is also not a case of implying any power for Magistrate.

14. It is then contended by learned Advocate respondent No. 1 that it is a question of remand or bail u/s 167(2). It is neither enquiry nor trial. It is only supervision by Court over investigation. It is not possible to accept this. The proceeding u/s 167(2) is judicial and Magistrate acts in judicial capacity. It is part of enquiry. It is covered by Section 2(g) and falls within Section 309(1) of Criminal Procedure Code.

15. The learned Advocate for respondent No. 1 contended that bail order is passed after hearing the prosecution and putting proper conditions and hence there is no power of stay that can be exercised by trial Court. I cannot accept this. For good reasons and in the interest of justice such power can always be reasonably exercised.

16. Section 309 falls in Chapter XXIV which deals with general provisions as to inquiries and trials. In my opinion, u/s 309(1) when the learned Magistrate can stay or adjourn the inquiry or the proceedings it includes the power to stay his own orders including bail order for good reasons. The power is incidental in nature and meant for properly regulating enquiry and trial. The underlying purpose is to hold the proceedings speedily and to punish the guilty effectively and early or release the innocent. It is not possible to hold that the Magistrate or trial Court is not having such power. He can give reasons and stay the same for a particular period or refuse to stay the same. Similarly, he can make the same operative for the given reasons after a particular period or refuse the prayer made on behalf of the party. We can visualise the cases where bail order is passed in serious offences involving smuggling or narcotic drugs. In many of these cases foreign nationals are involved. If bail is granted and the order is not stayed even for some reasonable time to enable the prosecution to approach the higher Court, it will be extremely difficult to effectively approach the higher Court and deal with accused. In the meanwhile, the person may become scarce and may not be available. This is also the experience. Therefore, the power of stay can be exercised by the learned Magistrate or trial Court for particular reasonable time. In fact, the apex Court expressed its anxiety while making observations in the judgment reported in State of Gujarat Vs. Mohanlal Jitmalji Porwal and

Another, mentioned above. It is not only the interest of an individual but the interest of the community is also required to be looked into. Further, the observations made by the apex Court in K.M. Mathew Vs. State of Kerala and another, , as quoted above, go to show that merely because it is not mentioned in the specific words in Section 309(1) that the subordinate Courts i.e. Magistrate or the trial Court can stay its order of bail for specific period cannot be followed that it has no such power. I hold that there is such power. Therefore, the observations made by the learned Magistrate while rejecting the prayer of the petitioner to stay the operation of the order for a few days or to make the same operative from 3rd September 1993 on the ground "that there is no provision to that effect in Criminal Procedure Code" are erroneous. But he could have declined to exercise the power considering the facts and circumstances. Discretion can be exercised judicially.

17. I further pass the following order :-

(i) The present learned Chief Metropolitan Magistrate (Shri S. A. Merchant) is directed not to take this matter i.e. R.A. No. 192 of 1993 or the case that would arise out of this at any stage of the proceedings.

(ii) The Registrar is directed to place the papers before the learned Chief Justice for information and action.

18. Hence, the Application is partly allowed. Rule absolute in terms of prayer (iv) subject to above. Rest of the prayer rejected.

19. Order accordingly.