

(2011) 04 OHC CK 0013
In the Orissa High Court
Case No : Wpcrl No. 35 of 2011

Kshetrabasi ' Lungudi Mohanty and another

APPELLANT

Vs

State of Orissa and another

RESPONDENT

Date of Decision : 27-04-2011

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 437(5), 438, 439, 439(2)

Penal Code, 1860 (IPC) — Section 120, 147, 148, 149, 294

Citation : (2011) 2 OLR 323

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S. Panda, J.—This writ petition has been filed by the petitioners under Article 227 of the Constitution of India challenging correctness of the order dated 12.11.2010 passed by the learned Addl. Sessions Judge, Khurda in BLAPL No.248 of 2010 cancelling the bail granted to them on 12.7.2010.

2. The facts leading to the present case are as follows:

On the information of one Padmabati Pala, Jankia P.S. Case No.158 of 2009 corresponding to G.R. Case No. 1299 of 2009 has been registered for commission of offences under Sections 147/148/294/341/324/326/307/506/302/120(b)/149 IPC. In the said case, the present petitioners along with others are the accused persons. One Santilata Dhinda wife of Rankanidhi Dhinda had also lodged an FIR on 3.12.2009 which was registered as Jankia P.S. Case No. 157 of 2009 corresponding to G.R. Case No. 1298 of 2009 for commission of offence under Sections 452/ 294/323/354/34 IPC. The present two petitioners after being arrested moved BLAPL Nos. 128 and 140 of 2010 before the learned Addl. Sessions Judge, Khurda who rejected the same on 12.5.2010. Thereafter the petitioners moved before this Court for regular bail in BLAPL Nos. 9310 and 9311 of 2010 which were rejected by this Court on

21.6.2010: Then the petitioners moved BLAPL No. 212 of 2010 before the learned Addl. Sessions Judge, Khurda which was allowed on 12.7.2010. After the bail order was passed, opposite party No.2 filed an application u/s 439(2) Cr.P.C. for cancellation of bail in BLAPL No. 248 of 2010 on the ground that earlier bail applications of the petitioners were rejected by this Court on 21.6.2010 and without disclosing the same, they have obtained the order of bail. Since that is a suppression of fact and their earlier bail applications have been rejected by the higher Court, the bail granted to them should be cancelled.

3. The petitioners filed their objection to the said application categorically stating that after the bail applications were rejected, they filed a bail application along with medical certificate dated 30.6.2010 before the learned SDJM, Khurda who rejected the said bail application on 6.7.2010. Thereafter, BLAPL No. 212 of 2010 was filed before the learned Addl. Sessions Judge who after considering the merits of the case and on the ground that in BLAPL Nos. 6891 and 6086 of 2010 the High Court observed that on surrendering the petitioners shall be released on bail in an application u/s 438 Cr.P.C. However, in BLAPL Nos. 9310 and 9311 of 2010 while rejecting the bail application u/s 439 Cr.P.C. This Court observed that the petitioners assaulted the deceased with thengas. Thereafter, the petitioners moved the bail application with medical grounds which was considered on merits and the bail was granted on merit by the learned Addl. Sessions Judge.

On 20.5.2010 this Court in BLAPL Nos. 6081 and 6086 of 2010 directed the petitioners to surrender before the learned S.D.J.M., Khurda and on surrendering they shall be released on bail on such terms and conditions as he may deem fit and proper. In the meantime the said order was recalled by this Court on 7.7.2010 on the ground that the petitioners have suppressed the fact regarding commission of offence u/s 302 IPC as the injured died after the registration of the FIR. It may be noted here that the present two petitioners along with other accused persons filed the aforesaid two bail applications u/s 438 Cr.P.C. They further averred that in the meantime the present petitioners have been arrested. Therefore, the rest of the petitioners filed a fresh application for anticipatory bail before the High Court which was allowed on 14.9.2010 in BLAPL No. 13696 of 2010 with a condition that the petitioners shall surrender before the learned S.D.J.M., Khurda and in such event their application shall be considered in the first hour so as to enable them to move the higher forum on the same day in the event of rejection. In pursuance of the said order, those applicants were released on bail. Since the present petitioners were arrested in the meantime, they moved regular bail before the learned S.D.J.M., Khurda and the counsel who filed regular bail application before the High Court has not intimated that the bail application was rejected on 21.6.2010 and in that view of the matter the suppression of facts cannot be attributed to the present petitioners and they shall not be suffered for the mistake of the counsel.

4. Learned Addl. Sessions Judge considering the application and the objection of the parties on 12.11.2010 cancelled the bail order granted by him on 12.7.2010

on the ground that the petitioners had suppressed the facts that their bail application had been rejected by the higher Court and they had also not disclosed the fact that the earlier order passed by this Court in an application u/s 438 Cr.P.C. dated 20.5.2010 had been recalled. The said order is impugned in this application.

5. Learned counsel appearing for the petitioners submitted that in the above factual backdrop of the case the petitioners did not disclose the facts but they have not suppressed any material fact. Rather, it was the learned counsel for the petitioners who has not given the certificate in the bail application regarding earlier rejection of the bail application by this Court. The petitioners are law abiding citizens. The learned Addl. Sessions Judge considered the application filed by the informant u/s 439 (2) Cr.P.C. and passed the impugned order of cancellation though the prosecution has not made out a case for cancellation of bail. Therefore, the impugned order is liable to be set aside by this Court.

6. Learned Addl. Government Advocate, however, supporting the impugned order submitted that since this Court rejected the bail application on 21.6.2010 and without disclosing the same the petitioners have obtained an order for release on bail, the Court below has rightly passed the impugned order which should not be interfered with.

7. The learned counsel for the informant submitted that the petitioners have suppressed the fact of filing of successive bail applications under Sections 438 and 439 Cr.P.C. and without disclosing that, only placed the order passed by this Court in BLAPL Nos. 6086 and 6891 of 2010 dated 20.5.2010 wherein it was directed that on surrendering they shall be released on bail and on the basis of the said order passed by this Court, the learned Addl. Sessions Judge granted bail on 12.7.2010. Since that order was obtained by suppression of fact, the Court below rightly cancelled the bail by the impugned order which should not be interfered with.

8. This Court considered the rival submissions of the parties. On the direction of this Court, learned Addl. Government Advocate has produced the case diary which is available in another connected bail application pending so far as another five accused persons are concerned.

9. From the narration of the facts, as stated in the above paragraphs, it appears that after rejection of the application u/s 439 Cr.P.C. on 21.6.2010 by this Court, the petitioners filed a bail application before the learned SDJM on medical ground which was also rejected. Thereafter, they filed BLAPL No. 212 of 2010 before the learned Addl. Sessions Judge which was allowed on 12.7.2010. From paragraph-7 of the said order the Court below taken into consideration that the allegations against the petitioners are omnibus. No definite overt act is attributed against them. They are found to be placed in the same footing as that of the co-accused persons, who have been released on bail. There is also no chance of their absconding and tampering with the investigation as they are found to be

permanent resident of village Dhabalpur under Jankia P.S. and charge sheet was already been submitted in the case. Thereafter, the Court below observed at paragraph-8 of the said order that in view of the order of this Court passed in BLAPL Nos. 6891 and 6086 of 2010, it is inclined to allow the prayer for bail. Therefore, the Court below considered the bail application of the petitioners on merit and granted them bail.

10. Though the informant filed an application for cancellation of bail on the ground of suppression of material facts and that the order dated 20.5.2010 passed by this Court in BLAPL Nos. 6891 and 6086 of 2010 has been recalled, she has not made out a case for cancellation of bail. No doubt, a person should approach with clean hands and should disclose all correct facts. He should not suppress any fact. In case the Court finds that there is some suppression of facts, that has to be considered strictly. However, in the present case, as narrated in the above paragraphs, the petitioners have not obtained the order by suppressing any fact, rather the order granting them bail was passed on 12.7.2010 on merits. Therefore, once a bail is granted on merits, the same shall not be cancelled unless the prosecution or the informant brings to the notice of the Court that the same is a fit case for cancellation of bail order as stipulated under Sections 437(5) and 439(2) Cr.P.C.

11. The apex Court in the case of Aslam Babalal Desai Vs. State of Maharashtra, has held that once the accused has been released on bail, liberty cannot be interfered with lightly and the ground of cancellation of bail are incidental under Sections 437(5) and 439(2), Cr.P.C. and the order, can be cancelled where (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 of 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. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

12. In view of the above position of law as propounded by the apex Court and after perusal of the case diary and in view of the fact that the observations made by the learned Addl. Sessions Judge while granting bail are found to be correct and that the petitioners have not done any overt act deserving cancellation of the bail order, this Court is inclined to interfere with the impugned order.

Accordingly, this Court sets aside the order dated 12.11.2010 passed by the learned Addl. Sessions Judge, Khurda in BLAPL No. 248 of 2010 exercising the jurisdiction under Article 227 of the Constitution of India.

13. The writ petition (Crl.) is accordingly allowed.