
(2013) 08 BOM CK 0151

In the Bombay High Court

Case No : Criminal Application No. 2713 of 2013

Madhav Premsing Rathod

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 05-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(5), 438, 438
Penal Code, 1860 (IPC) — Section 306, 354(A)

Citation : (2013) 5 ABR 1095 : (2013) ALLMR(Cri) 4036 : (2013) 3 BomCR(Cri) 786

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : S.J. Salunke, for the Appellant; D.V. Tele, APP for State and Mr. N.B. Khandare, Advocate, for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—The application is filed u/s 439(2) of Criminal Procedure Code for cancellation of anticipatory bail granted by the Additional Sessions Judge, Jalna in Criminal Application No. 403/2013. In crime registered against the respondent No. 2 for offence punishable under sections 306, 354(A) etc. of Indian Penal Code, relief of anticipatory bail is granted. The crime is registered on the basis of report given by the father of the deceased. The respondent/accused is a married man and at the relevant time, he was aged about 25 years. He has no issue from the wife. Allegations are made that he was after the deceased girl and he wanted to marry with her. The deceased was aged about 17 years and even before the incident in question the deceased had disclosed to her father about such conduct of the accused. She had also informed that she had said "no" to the offer given by the accused, but he was always after her and he was insisting her to marry with him.

2. The incident took place on 30.4.2013. At about 8.30 p.m. when the complainant was present near one shop, he learnt that near the house of one

Pandit, the accused was prevented by some villagers, when he was attempting to take the deceased with him by using force. The complainant went there and he took his daughter to home. She narrated the incident to him. As she was aged about 17 years, marriageable daughter, complaint was not given on 30.4.2013.

3. On 1.5.2013 when the complainant was present in his field, at about 5.00 p.m. he learnt that the deceased had consumed poison. He made an attempt to save her life by shifting her to hospital, but she died on the same day. The report came to be given on 2.5.2013.

4. The papers of investigation include the statements of witnesses, who had prevented the accused from taking the deceased forcibly with him. The record shows that the deceased committed suicide by consuming poison. Thus, there are allegations against the respondent/accused that he misbehaved with the deceased on 30.4.2013 and due to fear of defamation, the deceased committed suicide on 1.5.2013.

5. The application for anticipatory bail was moved on 8.5.2013. The respondent/accused contended that he has been falsely implicated in the case. He prayed for interim relief by making contention that he wanted to attend the marriage of his sister on 13.5.2013. Complainant filed affidavit on 9.5.2013 in the proceeding and he reiterated the allegations made against the respondent/accused. The Sessions Court granted interim relief to the respondent/accused for enabling him to attend the marriage of his sister. That order came to be made on 10.6.2013 and the contents of the order from which we can say that some reasons are given, are as follows:-

5. Applicant has submitted that there is marriage ceremony of his real cousin sister on 13.5.2013. In support of his submission he has produced on record marriage invitation card and submitted that he be released on interim bail till filing of say by State. Therefore, considering the genuine reason put forth by the applicant, I am inclined to grant interim anticipatory bail to the applicant till 14.5.2013. Hence, the order

6. The main application came to be decided by other Presiding Officer of the Sessions Court on 14.5.2013. The relevant portion which can be said to be so called reasons for giving anticipatory bail, is as under:-

5. Heard. Perused. Admittedly, ad interim anticipatory bail was granted to the applicant on the ground that there was marriage of his sister. However, the applicant used to attend the police station daily. Accordingly, since 11.5.2013 he is daily attending the police station. On going through the police papers I am satisfied that custodial interrogation of the applicant is not necessary. In this view of the matter, in my view, this is a fit case wherein anticipatory bail should be granted and ad interim anticipatory bail should be confirmed. Thus, the order.

7. The learned counsel for the applicant submitted that the Sessions Court has not given any reason for giving relief of anticipatory bail in such a serious case to

the respondent. He submitted that the relevant material is not at all considered by the Sessions Court and there is no observation made which shows that whether the material is sufficient or not sufficient to make out prima facie case. This Court has gone through the orders of both interim relief and final order, relevant portion of which are already quoted. The other portion of the orders contain only the rival contentions. Thus, it can be said that no reasons at all are given while giving relief of anticipatory bail in order dated 14.5.2013.

8. The learned counsel for the respondent/accused submitted that the present proceeding is not tenable u/s 439(2) of Cr.P.C. He submitted that as the relief is granted by the Sessions Court, the proceeding for cancellation of the order can be filed in only Sessions Court. He further submitted that there are no allegations of misuse of liberty and so the order cannot be cancelled. Both the sides cited some reported cases.

9. In view of the arguments advanced by the learned counsel for the accused, the relevant provisions need to be seen. In Cr.P.C., there are two provisions under which the order of bail can be cancelled. It can be said that the order of anticipatory bail can be cancelled u/s 439(2) of Cr.P.C. as section 437(5) of Cr.P.C. is in respect of the less serious offence and power u/s 437 of Cr.P.C. is ordinarily exercised by the Court of J.M.F.C./C.J.M. The provisions are as under:-

437. (5) Any Court which has released a person on bail under sub-section (1) or subsection (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

439. (2) 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.

10. The wording of section 437(5) of Cr.P.C. show that this section gives power to the Court, which has released a person on bail. The relief u/s 437 can be granted in less serious offences, ordinarily by the Court of J.M.F.C./C.J.M. The provisions of section 439 of Cr.P.C. show that the relief can be granted under this section either by High Court or Court of Session and it can be granted even in serious cases in which the imprisonment for life or death is provided. Section 438 of Cr.P.C. gives power to the High Court and Court of Sessions to grant relief of anticipatory bail and it can be granted even in so called serious cases covered u/s 439 of Cr.P.C. The wording of section 439(2) of Cr.P.C. show that High Court or Court of Session can make order of cancellation of bail made in favour of any persons under chapter providing for bail. Thus, the provision is not restricted in respect of the orders of bail or anticipatory bail made by the same Court. The provisions of Cr.P.C. show that no appeal is provided to Court of Sessions or High Court against the order made by J.M.F.C./C.J.M. for granting bail etc. Similarly, no appeal is provided against the order made by Sessions Court granting bail or anticipatory bail. The powers of Apex Court in this regard are different. They are not under Cr.P.C. and so, they need not be discussed in the present proceeding.

11. In view of the aforesaid provisions, it can be said that when bail or

anticipatory bail is granted by the Sessions Court, the application for cancellation of such order can be made to both Sessions Court and High Court. The distinction needs to be made in two situations, viz. when the order needs to be challenged by filing proceeding in High Court and when a proceeding can be filed to the same Court, the Sessions Court. In view of the conditions for granting bail etc. which are provided in sections 437, 438 and 439 of Cr.P.C., when there is allegation of breach of conditions, application can be made to the Sessions Court for cancellation of the order made by it. However when there is challenge to the order of Sessions Court on other ground like the error committed by Sessions Court in granting relief, such proceeding needs to be filed in High Court. In the cases reported like Gurcharan Singh and Others Vs. State (Delhi Administration), , Dinesh M.N. (S.P.) Vs. State of Gujarat, and also the landmark case reported as Puran Vs. Rambilas and Another etc. etc., , it is made clear by the Apex Court that a proceeding can be filed in High Court u/s 439(2) of Cr.P.C. for challenging the order made by the Sessions Court, granting bail. There is the interpretation of this provision in these reported cases. These provisions and interpretation made by the Apex Court show that bail granted by the Sessions Court or the Court of J.M.F.C./C.J.M. and anticipatory bail granted by Sessions Court can be cancelled by the High Court when a proceeding is filed u/s 439(2) of Cr.P.C. On this point, some reported cases were cited for respondent/accused, but the facts of those cases are different and the Apex Court was using the appellate power in those cases. Those cases are mentioned by this Court at later stage.

12. In the present case, the challenge is made to the order of Sessions Court on the ground that the Sessions Court has committed error in granting the relief. It is contended that even when there is sufficient material to make out strong prima facie case for serious offence, the Sessions Court has granted the relief. It was submitted that the applicant/complainant is feeling that justice is not done to him.

13. To ascertain whether it is necessary for criminal Court to give reasons at the time of granting relief, the relevant provisions need to be seen. The relevant portion of section 438 of Cr.P.C. is as follows:-

438. Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,... either reject the application forthwith or issue an interim order for the grant of anticipatory bail;....

The provision shows that the word "may" is used and it shows that it is a discretionary power. The provision further shows that while granting the relief, the Court is required to take into consideration inter alia (underline added) the factors such as the nature and gravity of offence etc. Thus, in section 438 of Cr.P.C. four parameters are given for granting relief of anticipatory bail. The word "inter alia" used in this section shows that the considerations mentioned in clauses (i) to (iv) are illustrative and not exhaustive. [Relied on the case of Puran cited supra can be also referred on this point].

14. The relief of anticipatory bail to some extent intrudes the investigation of crime. To the investigating agency statutory power is given to arrest the accused for the purpose of investigation though it is not binding on the investigating agency to arrest every accused. As the power of granting anticipatory bail is likely to interfere in the statutory power of police of investigation, the criminal Court is expected to be cautious and circumspect in exercising such discretionary power. Thus, Criminal Court must get first satisfied that it is not interfering with the power of police to make investigation and it must also get satisfied that the accused needs to be protected by granting such relief and for such satisfaction, the Court has to consider the parameters given in section 438 and also the other relevant factors of the case. It can be said that it is the duty of the Court to see that by the order, it is not protecting a person against whom there is allegations of serious nature and the allegations are not mala fide. In the cases reported as State of Maharashtra and Another Vs. Mohd. Sajid Husain Mohd. S. Husain etc., and Adri Dharan Das Vs. State of West Bengal, , the Apex Court has made it clear that while granting relief of anticipatory bail, the Court must record reasons. This Court has no hesitation to observe that the Court must be mindful of the difficulties which would be faced by the investigating agency, if such relief is granted and the Court must also consider the public interest. When a person like applicant is protected, it creates bad impact on the society.

15. The aforesaid position of law shows that if the material already collected by investigating agency prima facie shows that the accused is involved in a commission of grave crime, granting him relief of anticipatory bail, will not be proper exercise of discretion by the Court. In the case of Puran cited supra, the Apex Court has observed that when a criminal Court ignores relevant material, evidence, and passes order of granting bail in heinous offence and that too without giving any reasons, such order would be against principles of law. It is laid down by the Apex Court that in such a case in the interest of justice, the order would require cancellation. Thus, when there is infirmity in the order of Sessions Court, the High Court can cancel such order. Though it is true that while granting or refusing the relief, the Court is expected to note the material in brief

and draw prima facie opinion and not to make detail discussion of the facts, there must be some reasons covering atleast the factors of section 438 of Cr.P.C. in the order. Though it is true that the order of granting relief is not expected to be cancelled lightly, the approach of Court would be different depending on the factual matrix of the case. In the facts and circumstances of this case, this Court has no hesitation to observe that the Sessions Court has committed grave error in granting the relief of anticipatory bail in such serious case and that too without giving any reasons. Such order cannot be allowed to sustain in law and the interest of the justice requires cancellation of the order.

16. For the respondent/accused some reported cases are cited.

(i) State Vs. Amarmani Tripathi, ,

(ii) (2011) 10 SCC 235 [Union of India Vs. Hassan Ali Khan and Anr.],

(iii) CBI, Hyderabad Vs. Subramani Gopalakrishnan and Another,

This court was taken through the paragraph Nos. 17, 40, 23 respectively from aforesaid three reported cases. The Apex Court has discussed the distinction between the appellate powers and the power of the Court which wants to cancel the order made by it. This point is already discussed at sufficient length. This Court is considering the order of Sessions Court and not the order made by this Court. One more case reported as Dr. Narendra K. Amin Vs. State of Gujarat and Another, shows that the High Court had cancelled the bail granted by the Sessions Court by using power given u/s 439(2) of Cr.P.C. The High Court had cancelled the order by observing that seriousness of the offence was not considered by the Sessions Court. It is further observed that when the accused is involved in serious case, there is no reason to consider the circumstance that he has no bad antecedents. The Apex Court held that the High Court was justified in cancelling the bail.

17. The provisions of law discussed above show that u/s 439(2) of Cr.P.C. the High Court can cancel the bail granted by subordinate Court due to breach of conditions which are generally imposed in view of provisions of section 437 to 439 of Cr.P.C. The bail can be cancelled even when there is no allegation of breach of conditions, but the High Court finds that the subordinate Court has improperly, illegally granted the bail. In view of the discussion above, this Court holds that the application deserves to be allowed. In the result, the application is allowed. The order made by the Additional Sessions Judge, Jalna in Criminal Application No. 403/2013, granting relief of anticipatory bail to the respondent/accused is hereby set aside and relief granted is cancelled. The respondent/accused is to be arrested and committed to custody, jail.