

(1997) 12 BOM CK 0075

In the Bombay High Court

Case No : Criminal Writ Petition No. 1201 of 1996

Mahendra C. Vakharia

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 17-12-1997

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 7
Criminal Procedure Code, 1973 (CrPC) — Section 436, 446
Foreign Exchange Regulation Act, 1973 — Section 8(3), 9(1)

Citation : (1998) CriLJ 1924

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : J.A. Barday, for the Appellant; D.N. Salvi, M.K. Patwardhan and N.M. Patwardhan, for the Respondent

Judgement

1. Heard Mr. Bardav for petitioner and Mr. Patwardhan for respondent No. 2.

2. The petitioner has challenged the forfeiture of his bail bond by the learned Chief Metropolitan Magistrate in Remand Application No. 263 of 1994 by order dated 23rd March, 1995 as confirmed in Criminal Revision Application No. 136 of 1996 by the Additional Sessions Judge, Greater Bombay by order dated 13th September, 1996.

3. The present petition has come to be filed in the backdrop of following facts :

The petitioner was arrested for FERA violation on 12th September, 1994 for offences under sections 8(3) and 9(1)(a) of the FERA Act, 1973. He came to be released on bail by the order dated 28th September, 1994 whereby he was directed to be released on bail on furnishing surety in the sum of Rs. 1,50,000/- or alternately by furnishing cash bail of Rs. 1,00,000/-. The petitioner had availed of the said order of bail by furnishing cash bail of Rs. 1,00,000/-. It appears that subsequently detention order came to be issued against the petitioner under the provisions of COFEPOSA on 26-11-1994. As the petitioner

was not available for service of the detention order under the COFEPOSA, application was made by the Assistant Enforcement Officer on 2nd January, 1995 before the learned Chief Metropolitan Magistrate for cancellation of bail and issue of non-bailable warrant and also for forfeiture of cash bail. The copy of the said application is at page 33 of the Record and Proceedings which mentions that the officers had visited at the known addresses of the accused person on 14-12-94 and 21-12-94 when he was not available for service of the said order. Pursuant to the said application the learned Chief Metropolitan Magistrate passed order cancelling the bail bond and issued non-bailable warrant against the petitioner. Thereafter application was made on 23rd March, 1995 by the Enforcement Officer before the Magistrate's Court praying for cancellation of bail and forfeiture of cash bail on the ground that when the officers went to the address of the petitioner on 18-1-1995, 30-1-1995, 16-2-1995 and 8-3-1995 for service of non-bailable warrant the said could not be executed because the petitioner was not available. The learned Chief Metropolitan Magistrate, therefore, passed the impugned order dated 23rd March, 1996 which reads as under :

"Heard the officer. He says that he went to the house of the accused on 3 times.

His bail bond is cancelled and forfeited."

4. The petitioner challenged this order in the Revision Application No. 136 of 1996 which, as stated earlier, came to be dismissed confirming the order of the Magistrate.

5. Mr. Barday the learned counsel appearing on behalf of the petitioner submitted that the bail bond cannot be cancelled unless the conditions of bond were violated. Secondly he contended that no showcause notice was issued to the petitioner before passing the impugned order and so ex parte order passed without notice is bad in law as being in contravention of the principles of natural justice.

6. The bond which was executed by the petitioner was read out by Mr. Patwardhan on behalf of the respondent No. 2 from the record and proceedings of the case. He, however, could not point out violation of any of the conditions of the said bail bond. What is contended on behalf of the respondent No. 2 by Mr. Patwardhan is that the detention order is cognate proceeding adopted against the petitioner and when he was not available for the service of the same the Magistrate could have cancelled his bail bond.

7. Mr. Barday on the other hand cited before me the judgment of the Supreme Court in the case of Free Legal Aid Committee, Jamshedpur Vs. State of Bihar, wherein it is held that once the accused is released on bail he is not required to appear before Court even in the same case until chargesheet is filed and process is issued by Court. In that case the practice followed by the Magistrates' Courts in Bihar requiring accused to appear before Court every fourteen days even though he was on bail, was disapproved, by Supreme Court. It is not in dispute that the petitioner was not required to appear before the Magistrate in the

criminal proceedings adopted in the Magistrates Court for the FERA violation. It is fairly pointed out by Mr. Patwardhan that the complaint was not filed in that Court by that date Mr. Barday points out that even as on today no complaint has been filed. It is pointed out that subsequently the detention order was served on the petitioner and he was thereafter released.

8. In my view the orders passed by the lower Courts are not warranted by any of the provisions of law. The reference made by the Sessions Court to Section 446 of Cr.P.C. is out of context. First of all there was no violation of any of the conditions of the bail bond and therefore there was no question of cancelling bail bond and forfeiting cash bail. Secondly there was no occasion for the learned Magistrate to issue non-bailable warrant. The powers of the Magistrate are not wide enough to cancel bail in a criminal case and issue non-bailable warrant if the accused is not available for service of detention order or for service of any other criminal proceedings.

9. In my opinion the step taken by the department itself was wrong and not warranted by any of the provisions of law. Section 7 of the COFEPOSA Act provides for the remedy which the detaining authority could resort to in case the person against whom the detention order was issued is not available for execution of that order. In that case the detaining authority can apply to concerned Magistrate for taking action under Sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973. The Magistrate who is authorised to take action under the said provisions is the one in whose jurisdiction the person concerned resides and not the Magistrate in whose Court the criminal proceedings for FERA violation are pending. The application made for the said purpose in the FERA proceedings is not warranted by law. That Court has power to cancel bail only when the conditions of bail bond are violated, and not for any other default on the part of the person who has executed bond. Power of any Court to take action is limited by the conditions of bond. It is needless to add that Court can exercise only those powers which are conferred on it by law expressly or by necessary implication and no other.

10. In the circumstances, both the impugned orders are liable to be quashed as passed beyond the jurisdiction conferred on them by law.

Hence this writ petition is allowed and rule is made absolute in terms of prayer Clause (b) of the petition.

11. Petition allowed.