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In the Bombay High Court

Case No : Criminal Writ Petition No. 1607 Of 2018

Pankaj Jivdhar Katke — APPELLANT

Vs

State of Maharashtra And Ors — RESPONDENT

Date of Decision : 05-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 408, 409, 420, 470, 471, 477A
Code of Criminal Procedure, 1973 — Section 408, 437, 439(2)

Citation : (2019) 2 BCR(Cri) 306

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : A.K. Bhosale, S.P. Deshmukh, S.J. Rahate

Final Decision : Allowed

Judgement

1. Heard. Rule. Rule is made returnable forthwith.

The learned APP waives service for Respondent No.1- State. The learned advocate Mr. S.J.Rahate waives service for Respondent No.2. At the request of both the sides, the matter is heard finally at the stage of admission.

2. The applicant is an accused from Crime No.405 of 2018 registered with MIDC Waluj Police Station lodged at the instance of Respondent No.2 for the offences punishable under Section 408, 409, 420, 470, 471, 477- A, 120-B read with Section 34 of the IPC. The offence was registered on 02.10.2018. He was arrested on 03.10.2018. After initial police custody he was remanded to magisterial custody. He submitted an application for bail. After calling the say of the prosecution, by the order dated 10.10.2018 the Magistrate granted him bail subject to suitable conditions.

3. Respondent No.2 submitted an application for cancellation of bail under Section 439(2) of the Cr.P.C. before the Sessions Court in Criminal Miscellaneous Application No.291 of 2018. By the impugned order dated 31.10.2018 the learned Additional Sessions Judge allowed the application and cancelled the bail.

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Hence this Writ Petition.

4. The learned advocate for the petitioner vehemently submitted that the parameters for grant of bail and those which govern the law relating to cancellation of bail are entirely different. There was no supervening or overwhelming circumstance warranting cancellation. The discretion exercised by the Magistrate in granting bail was exercised judiciously. There was no apparent perversity or illegality which could have enabled the learned Additional Sessions Judge to invoke the powers under Sub Section 2 of Section 439 of the Cr.P.C. The law has been well settled in catena of judgments of the Supreme Court viz. X Vs. State of Telangana ; 2018 SCC online SC 549, Bhim Singh Vs. Radhey Shyam ; 2018 ALL MR (Cri.) 468, Ramcharan Vs. State of Madhya Pradesh ; 2006 (1) SCC (Cri.) 511, Dolat Ram Vs. State of Haryana ; 1995 SCC (Cri.) 237.

5. The learned advocate for the petitioner would further point out that the allegations against the accused persons are to the effect that the applicant was an employee of Respondent No.2. He had won the faith and was allowed to operate the account of the firm electronically. He misused the power and managed to transfer more than Rs.95,00,000/- from the account of the firm to his personal savings account. The petitioner was arrested. He was remanded to police custody and it is thereafter that he was remanded to magisterial custody. Meaning thereby that the purpose of sending him to the police custody to enable the Investigation Officer to have his interrogation was over and therefore, there are no question of his custodial interrogation thereafter. Necessary precaution was taken by the learned Magistrate by imposing a condition inter alia directing him to attend the concerned Police Station fortnightly till filing of the charge-sheet. This could have further enabled the Investigating Officer to interrogate him if necessary. It was under these circumstances the Magistrate had objectively exercised the discretion and by his elaborate / speaking order had granted bail. There was no sufficient basis for the learned Additional Sessions Judge to cancel the bail. The impugned order be quashed and set aside and the one passed by the Magistrate granting bail be restored.

6. The learned APP requested to decide the petition on its own merits but informed that the State has not applied for cancellation of bail.

7. The learned advocate for Respondent No.2 by referring to his affidavit-in-reply submitted that the offence is serious. It is a matter of misappropriation by a servant. He was in fact authorized to operate the bank account and for that purpose was given the User ID and the Password which he has misused and has misappropriated huge amount in connivance with the co-accused. He further contended that though the petitioner was remanded to police custody he did not co- operate the Investigating Officer. The money was not recovered. It was transferred to his friend one Santosh Wagh and still there was no recovery. The investigation was still pending. The offence was punishable under Section 409 of the IPC and for which the punishment extends upto life imprisonment. Ignoring this fact the Magistrate had invoked the powers under Section 437. He had no

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jurisdiction since the offence was punishable upto life imprisonment. Ignoring all these facts the Magistrate had granted bail. The order was clearly perverse and arbitrary and was also without jurisdiction. There was no fault on the part the learned Additional Sessions Judge in directing cancellation of the bail. In fact it is the settled principle that it is an economic offence and should have been viewed from that perspective. The order was grossly erroneous and certainly was rightly set aside cancelling the bail. The learned advocate in support of his argument referred to the decisions of the Supreme Court in the case of Nimmagadda Prasad Vs. Central Bureau of Investigation ; (2013) 7 SCC 466, Gulabrao Baburao Deokar Vs. State of Maharashtra and others ; (2013) 16 SCC 190, Rohit Tandon Vs. Directorate of Enforcement ; (2018) 11 SCC 46.

8. I have carefully gone through the decisions cited by both the sides. Instead of referring to the cases cited on behalf of both the sides individually, one can conveniently refer to the decision in case of Kanwar Singh Meena Vs. State of Rajasthan ; (2012) 12 SCC 180 wherein by referring to several earlier decisions of the Supreme Court the principles have been succinctly laid down in following words in paragraph No.10.

''While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.''

Incidentally, these principles have been subsequently referred to and relied upon by the Supreme Court in the case of X Vs. State of Telangana (supra). It is thus trite that the factors which should weigh with the Court while invoking the power under Sub Section 2 of Section 439 of the Cr.P.C. are gravity of the offence, severity of punishment, existence of any supervening or overwhelming circumstance. In addition, a bail can be cancelled when the order granting bail is

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grossly erroneous. Keeping in mind these principles let us examine the impugned order and the one passed by the Magistrate.

9. The Magistrate while granting the bail has considered the fact that going by the allegations prima facie the offence punishable under Section 408 of the IPC would be attracted and not Section 409. Custodial interrogation was no longer required. The documents were already seized. The petitioner had a permanent place of residence and roots in the society. There were no criminal antecedents. He was remanded to police custody from 03.10.2018 to 09.10.2018. It is thereafter the Investigating Officer himself had requested for his remand to the magisterial custody. He was merely a servant / employee of Respondent No.2 and there was no material to indicate that he was influential enough to pressurize the witnesses or to tamper the evidence. Apart from considering these aspects the learned Magistrate had also considered the provisions of Section 437 of the Cr.P.C. and considering such facts and law he directed the petitioner to be released on bail and imposed certain conditions including that of attending the concerned Police Station fortnightly. It is thus quite clear that by no stretch of imagination one could have said that the order was either perverse, arbitrary or capricious. There was no gross illegality or infirmity either.

10. True it is that the learned Magistrate had erroneously, while referring to the provisions of Section 437 of the Cr.P.C. observed that the punishment for the offence punishable under Section 409 of the IPC was not a punishment for death or life imprisonment, when that Section clearly provides that the offence is punishable upto life imprisonment. However as is mentioned herein above it was specifically argued that the offence punishable under Section 408 of the IPC alone could be made out.

11. Independently, even if one decides to consider this aspect now, since the petitioner was an employee / servant of Respondent No.2 who had allegedly misappropriated the money and had committed criminal breach of trust, it is only the offences punishable under Sections 403, 406 and 408 can be made out. The offence punishable under Section 409 of the IPC is applicable only in respect of criminal breach of trust by a public servant, banker, merchant, factor, broker, attorney or agent. Whereas Section 408 of the IPC is applicable in respect of criminal breach of trust by a clerk or a servant. Therefore, the learned Magistrate certainly had the jurisdiction to grant bail under Section 437 of the Cr.P.C. The submission of the learned advocate for Respondent No.2 that it was an offence punishable upto life imprisonment and therefore the Magistrate had no power under Section 437 of the Cr.P.C. to grant bail, in my considered view, is not sustainable. The offence punishable under Section 408 of the Cr.P.C. is only punishable upto 7 years and the Magistrate did have the jurisdiction under Section 437 to grant bail.

12. Overlooking all the above mentioned facts and circumstances and particularly the grounds assigned by the Magistrate and without spelling out the grounds which are well settled which govern the law relating to cancellation of bail, the

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learned Additional Sessions Judge has intervened apparently by setting over the order of the Magistrate as a Court of appeal. One need not decipher the powers of a Court of appeal and the power vested in the Sessions Court or the High Court in Sub Section 2 of Section 439 of the Cr.P.C. It appears that the learned Additional Sessions Judge has misdirected himself by referring to the decisions in the case of State of Gujrat Vs. Mohanlal Jitamlaji Parwal ; (1987) SCC (Cri.) 364, Rohit Tandon Vs. Director of Enforcement ; (2018) 11 SCC 46, Gulabrao Deokar Vs. State of Maharashtra ; (2013) 16 SCC 190 in observing that the present offence is an economic offence of a similar category when those matters were in respect of misappropriation or criminal breach of trust by public servants or bankers / merchants etc. The learned Additional Sessions Judge lost sight of the fact that the matter in hand pertains to a plain case of misappropriation by a servant and no public interest is involved. Still by assuming that the present offence falls under that category, he has interfered in the order passed by the Magistrate and has cancelled the bail assuming a jurisdiction under Sub Section 2 of Section 439 of the Cr.P.C.

13. It is also pertinent to note that though the learned advocate for Respondent No.2 has vehemently argued that the investigation is not complete and there is a strong case for interrogation of the petitioner who had not co-operated the Investigating Officer when he was remanded to police custody, it was the Investigating Officer who himself had requested for remanding the petitioner to magisterial custody. State has not applied for cancellation of bail and therefore merely because Respondent No.2 states that presence of the petitioner behind the bar is still necessary to complete the investigation, the submission cannot be considered.

14. The impugned order is certainly not legally tenable and is liable to be quashed and set aside restoring the order passed by the Magistrate of granting bail.

15. The Writ Petition is allowed. The impugned judgment and order dated 31.10.2018 is quashed and set aside and that of the Magistrate dated 10.10.2018 is restored.

16. Rule is made absolute in above terms.

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