
(2015) 07 CHH CK 0016
In the Chhattisgarh High Court
Case No : Criminal M.P. No. 469 of 2015

Savita Khande and Others	Vs	APPELLANT
State of Chhattisgarh and Others		RESPONDENT

Date of Decision : 27-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362, 439, 439(1), 439(2)
Penal Code, 1860 (IPC) — Section 304, 304-A

Citation : (2015) 4 CGLJ 122

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Sudha Bhardwaj, for the Appellant; Sidhharth Rathore, Dy. Govt. Advocate, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal, J—Invoking the jurisdiction of this Court under sub-section (2) of Section 439 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), the petitioners herein seeks cancellation of bail granted to the respondent No. 2 herein in M. Cr.C. No. 6415 of 2014 on 4.12.2014 under Section 439 of the Cr.P.C. for the offence punishable under Sections 304 and 304-A of the IPC claiming to be the victims of the Sterilization Operation conducted by the respondent No. 2.

2. In an application filed under Section 439(2) of the Cr.P.C., the petitioners herein averred that regular bail under Section 439 of the Cr.P.C. was granted to the respondent No. 2 by this Court, rather he obtained bail by suppression and misrepresentation of facts and this Court also considered irrelevant material of a substantial nature. It has been further pleaded that additional new adverse facts have also surfaced after grant of bail to the respondent No. 2 as viscera reports of the victims made available after chemical analysis have no signs of toxicity due to drugs and women patients died mainly due to severe septicaemia, peritonitis and septic shock as surgical instrument was not adequately sterilized,

when it was being used and surgical operations were performed in gross violation of the Standard Operating Procedures and the respondent No. 2 performed the said operations in the conditions, which he was well aware, were not aseptic and he could not have been given the benefit of interpretation rendered by their Lordships of the Supreme Court in case of Jacob Mathew Vs. State of Punjab and Another, (2005) ACJ 1840 : AIR 2005 SC 3180 : (2009) 2 CompLJ 367 : (2005) 3 CPJ 9 : (2005) CriLJ 3710 : (2005) 4 CTC 540 : (2005) 6 JT 584 : (2005) 6 SCC 1 : (2005) 2 SCR 307 Supp of indiscriminate prosecution. It has also been pleaded that the respondent No. 2 is highly influential doctor and award winner and has close connection in the bureaucracy, therefore, order granting bail may be cancelled in exercise of the jurisdiction conferred under Section 439(2) of the Cr.P.C.

3. Ms. Sudha Bhardwaj, learned counsel appearing for the petitioners would vehemently submit though the grounds for cancellation of bail stands on different footings than of refusal of bail in the first instance, but there are cogent and overwhelming circumstances of non-consideration of relevant considerations, or where the bail order has been granted ignoring the material and perverse order is passed or if the accused obtains bail order by misrepresentation or suppression of the facts, the bail order may be cancelled by this Court exercising jurisdiction under Section 439(2) of the Cr.P.C. She placed reliance upon the judgment of the Supreme Court in cases of Ram Govind Upadhyay Vs. Sudarshan Singh and Others, AIR 2002 SC 1475 : (2002) CriLJ 1849 : (2002) 2 Crimes 15 : (2002) 3 JT 185 : (2002) 3 SCALE 12 : (2002) 3 SCC 598 : (2002) 2 SCR 526 : (2002) AIRSCW 1342 : (2002) 2 Supreme 457 , Ram Babu Tiwari Vs. State of M.P. and Another, (2009) 14 JT 69 : (2009) 6 SCALE 317 : (2009) 7 SCC 194 : (2009) 6 SCR 1012 and Harjeet Singh @ Seeta Vs. State of Punjab and Another, AIR 2002 SC 281 : (2002) CriLJ 571 : (2002) 1 Crimes 229 : (2001) 10 JT 336 : (2001) 8 SCALE 387 : (2002) 1 SCC 649 : (2001) AIRSCW 4998 : (2001) 8 Supreme 607 .

4. Ms. Bhardwaj, learned counsel would further submit that in the instant case, bail was obtained by the respondent No. 2 by suppressing the material facts and misrepresenting the facts as bail order reflects consideration of irrelevant material of a substantial nature and new adverse facts have come to the light duly pleaded in the application, that death mainly resulted due to gross negligence of the respondent No. 2 in performing the operations violating the standard operating guidelines as prescribed by the competent authority and he was wrongly given the benefit of interpretation made in the case of Jacob Mathew (supra) of indiscriminate prosecution and as respondent No. 2 being the most influential person as the doctors community went on strike in support of him suggestive of his influence and therefore, order granting bail may be cancelled.

5. I have heard learned counsel for petitioners on question of admission and given thoughtful consideration to the submission made.

6. The short question that falls for consideration in order to entertain the present

application under Section 439(2) of the Cr.P.C. is whether the petitioners have prima facie made out any ground for cancellation of bail under Section 439(2) of the Cr.P.C.

7. It is quite well settled that the parameter for grant of bail and cancellation of bail are entirely different. Bail granted under Section 439(1) of the Cr.P.C. 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 or 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. It is also well settled that even if two views are possible, once the bail has been granted, it should not be cancelled (See *Jayendra Saraswathi Swamigal Vs. State of Tamil Nadu*, AIR 2005 SC 716 : (2005) 99 CLT 644 : (2005) CriLJ 883 : (2005) 1 CTC 233 : (2005) 1 JT 361 : (2005) 2 SCC 13 and *Nityanand Rai Vs. State of Bihar and Another*, AIR 2005 SC 2239 : (2005) CriLJ 2187 : (2005) 4 JT 368 : (2005) 4 SCC 178 : (2005) AIRSCW 2034 : (2005) 3 Supreme 354).

8. The Constitution Bench of the Supreme Court has considered the scope of power of the High Court under Section 439(2) of the Cr.P.C. in *Gurcharan Singh and Others Vs. State (Delhi Administration)*, AIR 1978 SC 179 : (1978) CriLJ 129 : (1978) 1 SCC 118 : (1978) SCC(Cri) 41 : (1978) 2 SCR 358 and catalogued the principles governing the powers of the Courts granting and cancelling bail in paragraph 16 of the report which reads as under:-

"16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant to bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who has been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code High Court may commit a person released on bail under Chapter XXXIII by an Court including the Court of Session to custody, if it thinks appropriate to do so. It must however be made clear that a Court of session

cannot cancel a bail which has already been granted by the High Court unless new circumstances arises during the progress of the trial after an accused person has been admitted to bail by the High Court. It, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Session Judge if certain new circumstances have arisen which were not earlier known to the State, and necessarily, therefore to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When however, the State is aggrieved by the order of the Session Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Session Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

9. Similarly in the matter of *Puran Vs. Rambilas and Another etc. etc.*, AIR 2001 SC 2023 : (2001) CriLJ 2566 : (2001) 2 Crimes 283 : (2001) 2 DMC 1 : (2001) 5 JT 226 : (2001) 3 SCALE 695 : (2001) 6 SCC 338 : (2001) 3 SCR 432 : (2001) 2 UJ 875 : (2001) AIRSCW 1935 : (2001) 3 Supreme 685 . Their Lordships of the Supreme Court has held that the concept of setting aside, unjustified, illegal or perverse order is absolutely different from cancelling an order of bail on the ground that accused has misconducted himself or because of some supervening circumstances warranting such cancellation.

10. Quite recently, their Lordships of the Supreme Court in the matter of *Abdul Basit Vs. Abdul Kadir Choudhary*, (2015) 1 CCR 173 : (2014) 4 Crimes 561 : (2014) 4 JCC 2810 : (2014) 4 RCR(Criminal) 716 considered all its earlier judgments on the issue and pointed out distinction between review/recall of order granting bail from cancellation of bail order and have held that the Court granting bail cannot review its order on the ground of it being illegal, unjustified or perverse in view of express bar contained in Section 362 of the Cr.P.C. and held in paragraphs 20, 21, 26 and 27 of the report as under.

"20. In the instant case, the respondents herein had filed the criminal miscellaneous petition before the High Court seeking cancellation of bail on grounds that the bail was obtained by the petitioners herein by gross misrepresentation of facts, misleading the court and indulging in fraud. Thus, the petition challenged the legality of the grant of bail and required the bail order to be set aside on ground of it being perverse in law. Such determination would entail eventual cancellation of bail. The circumstances brought on record did not reflect any situation where the bail was misused by the petitioner-accused. Therefore, the High Court could not have entertained the said petition and cancelled the bail on grounds of it being perverse in law.

21. It is an accepted principle of law that when a matter has been finally disposed of by a court, the court is, in the absence of a direct statutory provision, *functus officio* and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or

modified to that extent. It is also settled law that the judgment and order in the absence of any express provision in the Code for the same. Section 362 of the Code operates as a bar to any alteration or review of the cases disposed of by the court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the court.

26. In the instant case, the order for bail in the bail application preferred by the accused-petitioners herein finally disposes of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Code, the High Court becomes functus officio and Section 362 of the Code applies herein barring the review of judgment and order of the Court granting bail to the petitioner-accused. Even though the cancellation of bail rides on the satisfaction and discretion of the court under Section 439(2) of the Code, it does not vest the power of review in the court which granted bail. Even in the light of fact of misrepresentation by the petitioner-accused during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by setting in review of its judgment by entertaining miscellaneous petition.

27. Herein, the High Court has assigned an erroneous interpretation to the well settled position of law, assumed expanded jurisdiction into itself and passed an order in contravention of Section 362 of the Code cancelling the bail granted to the petitioners herein. Therefore, in our considered opinion, the High Court is not justified in reviewing its earlier order of grant of bail and thus, the impugned judgment and order requires to be set aside."

11. Applying the statement of law rendered by their Lordships of the Supreme Court in the aforesaid cases particularly Abdul Basit (supra), it is limpid that the petitioners herein have sought cancellation of order granting bail on the ground that bail order was granted to the respondent No. 2 by suppression and misrepresentation of facts as well that the order considering bail reflects consideration of irrelevant material of a substantial nature and additionally new adverse facts have surfaced, thereby claiming that the order of bail is absolutely unjustified, illegal and perverse. It is not the case of the petitioners herein that the respondent No. 2 has misconducted himself after grant of bail by this Court warranting cancellation of bail order, therefore, order granting bail deserves to be cancelled. The facts and grounds pleaded in an application for cancellation of bail under Section 439(2) Cr.P.C. and submissions made therein, in light of the law laid down by their Lordships of the Supreme Court in the above mentioned judgment is not the scope and jurisdiction of this Court, as such alleged illegality, perversity cannot be determined by this Court in this application for cancellation of bail filed under Section 439(2) of Cr.P.C. as it would amount to review/recall of bail order, which impermissible, in the light of express bar contained in Section 362 of the Cr.P.C. which bars the jurisdiction of this Court to alter or review the bail order or judgment except to correct an clerical or arithmetical error.

12. As a fall out and consequence of the aforesaid discussion, the application

filed under Section 439(2) of the Cr.P.C. deserves to and is hereby rejected at the admission stage without notice to other side. No order as to cost(s).