
(2013) 08 JH CK 0024

In the Jharkhand High Court

Case No : Cr.M.P. No. 1594 and 1643 of 2013

Shailesh Kishore Sinha and Bipin Bihari Sinha

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2013) 4 JLJR 249

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Advocate : Pandey Neeraj Rai and Prashant Pallav, for the Appellant; Shailesh, for the Respondent

Final Decision : Disposed Off

Judgement

Rakesh Ranjan Prasad, J.—Both the cases since arising out of the same impugned order, it were heard together and are being disposed of by this common order. The facts of the case giving rise to Cr.M.P. No. 1643 of 2013 are that the complainant Sunil Kumar Choudhary was awarded with a contract for installation of 73 Tube Wells. Consequent upon this the complainant submitted application along with requisite documents in the office of the Executive Engineer, Bipin Kumar Sinha for execution of an agreement. That application was returned to the complainant, who later on came to know that the work allotted has been cancelled. Thereupon when the complainant contacted to the petitioner, the petitioner a Superintending Engineer demanded bribe. The matter was informed to the S.P. Vigilance by the complainant. On receiving such complaint, a trap team was constituted and a raid was conducted at the house of the petitioner where the petitioner in that course was caught raid handed with bribe-money of Rs. 2,70,000/-. On search being effected of the house, an additional amount of Rs. 4.90,000/- was found. Thereupon an FIR was lodged on 2.1.2013 which was registered as Vigilance P.S. case no. 2 of 2013 u/s 7/13(2) of the Prevention of Corruption Act.

2. The facts of the case giving rise to Cr.M.P. No. 1594 of 2013 are that the

complainant Sunil Kumar Choudhary when was awarded work of installation of 175 Drill Tube Wells, necessary applications along with requisite documents were submitted for execution of the agreement but for that, bribe of Rs. 1,00,000/- was demanded. The matter was informed to the S.P. Vigilance, who laid a trap during which the petitioner (Executive Engineer) was caught red handed, while receiving the bribe amount. On such allegation, a case was registered as Vigilance P.S. case no. 1 of 2013 under Sections 7/13(2) of the Prevention of Corruption Act.

3. In both the cases, the petitioners were remanded to the jail custody, on being produced before the Magistrate on 5.1.2013. The Vigilance having completed investigation submitted charge sheet on 4.3.2013 well within the stipulated period of 60 days. However, the prosecution failed to have order sanctioning prosecution. In that event, the court finding himself handicapped in taking cognizance of the offence did grant bail to the petitioners, vide order dated 16.3.2013.

4. Thereupon an application was filed on behalf of the Vigilance in both the cases for cancelling the bail granted to the petitioners stating therein that the charge sheet though was submitted in time, but it was not accompanied with the order sanctioning prosecution and hence, the court by assuming that he is handicapped in taking cognizance granted bail, though in view of the decision rendered in a case of Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another, the petitioners were not entitled to have bail on submission of the charge sheet within the time stipulated under the Code notwithstanding the fact that it was not accompanied with the order sanctioning prosecution and thereby the prayer was made to cancel the bail at both the petitioners.

5. Learned Vigilance Judge having heard learned counsel appearing for the parties did record that on submission of the charge sheet when order sanctioning prosecution was not brought by the Vigilance, the court keeping in view the prohibition stipulated u/s 309 of the Code of Criminal Procedure of not remanding the accused to jail custody unless cognizance of the offence is taken and also decision of this court granted bail to the petitioners. It further been recorded that at that time, the court was not aware of the decision referred to on behalf of the Vigilance that on submission of the charge sheet within the time stipulated under the Code, the court does have power to remand the accused even in absence of any order relating to sanction for prosecution. In such event, the order granting bail is fit to be cancelled and accordingly, it was cancelled, vide order dated 18.6.2013. That order is under challenge in both the cases.

6. Learned counsel appearing for the petitioners submitted that once the order of release is by fiction of law an order passed relating to grant of bail either u/s 437(1) or (2) or Section 439(1), that order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order. Meaning thereby that bail granted u/s 437(1) or (2) or Section 439(1) can be cancelled where the accused misuses his liberty by

indulging in similar criminal activity, interferes with the course of investigation, attempts to tamper with evidence or witnesses, threatens witnesses or indulges in similar activities which would hamper smooth investigation or there is likelihood of accused being absconded but here in the instant case, the bail has been cancelled on altogether different ground and as such, cancellation of bail would amount to recall of its own order which power the criminal court does not have.

7. Learned counsel further submitted that the court while granting bail never seems to have committed any wrong either on fact or on law as after submission of the charge sheet, the court derives power to remand the accused to custody by virtue of the provision as contained in Section 309(2) of the Code of Criminal Procedure only when cognizance of the offence is taken. Since on account of non-filing of the order granting sanction, the court was handicapped in taking cognizance of the offence only way out which was there was to grant bail to the petitioner which the court did and therefore, the court had no valid reason to cancel the bail in spite of the decision rendered in a case, referred to by the Hon"ble Supreme Court wherein main issue was as to whether in absence of cognizance for want of sanction, an accused would be entitled to statutory bail or not and therefore, the court was not justified in cancelling the bail under the garb of the order of the Hon"ble Supreme Court rendered in the case referred to above.

8. It was further submitted that earlier the bail was granted when the prosecution in spite of filing charge sheet failed to bring on record the order granting sanction but merely on filing the order granting sanction for prosecution, the bail on the prayer made by the Vigilance was cancelled which is quite illegal, in view of the decision rendered in a case of Aslam Babalal Desai Vs. State of Maharashtra, wherein their Lordships have held that statutory bail granted u/s 167(2) of the Code of Criminal Procedure is not liable to be cancelled on filing of the charge sheet.

9. As against this, Mr. Shailesh, learned counsel appearing for the Vigilance submitted that the circumstances as stipulated u/s 437(5) or 439(2) such as. propensity of accused to tamper with evidence, interfere with the due course of justice, to flee from justice may not alone the circumstances to cancel the bail. The High Court or the sessions court can cancel bail even in the case where the order granting bail suffers from serious infirmity resulting into miscarriage of justice. Upon filing an application by the Vigilance when the court did find that grant of bail was not justified on account of non-filing of the order granting sanction at the time of submission of charge sheet, the court did cancel the bail and thereby the court is absolutely justified in cancelling the bail in view of the decision rendered in a case of Kanwar Singh Meena Vs. State of Rajasthan and Another, .

10. Having heard and on perusal of the record, it does appear that charge sheet in this case was submitted within the time stipulated but it did not accompany

the order sanctioning prosecution and thereby the court keeping in view the provision as contained in Section 309(2) of the Code of Criminal Procedure did find himself handicapped in taking cognizance and remanding the petitioners to custody and hence, granted bail to both the petitioners. However, subsequently by submitting the order granting sanction, an application was filed on behalf of the Vigilance for cancelling bail, taking cue from the decision rendered in a case of Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and another (supra) holding therein that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge sheet had been filed well within the period of contemplated u/s 167(2)(a)(ii) of the Code of Criminal Procedure. In such situation, the bail was cancelled.

11. Thus, it is to be considered as to whether the court was justified in cancelling the bail?

12. It be reiterated that the court has cancelled the bail on the ground that the court without taking notice of the decision rendered in a case of Suresh Kumar Bhikamchand Jain vs. State of Maharashtra and another (supra) had granted bail to the petitioners though they were not entitled to and that sanction for prosecution has been granted.

13. It be recorded that it is easier to reject the bail application in a non-bailable case than to cancel a bail once granted for the reason that cancellation of bail does have interference with the liberty already secured by the accused either in exercise of discretion by the court or by the thrust of law.

14. In such situation, the Hon'ble Supreme Court in a case of State (Delhi Administration) Vs. Sanjay Gandhi, has been pleased to observe that power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. The Court has further observed that it does not mean that the power though extraordinary in character must not be exercised even if the ends of justice so demands.

15. I may further refer to a decision rendered in a case of Aslam Babalal Desai vs. State of Maharashtra (supra) wherein following question for consideration was cropped up.

16. Can bail granted under proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 for failure to complete the investigation within the period prescribed thereunder be cancelled on mere presentation of the challan (charge sheet) at any time thereafter?

17. Their Lordships while deciding the matter did take notice of the decision rendered in a case of Bashir and Others Vs. State of Haryana, wherein their Lordships after examining the relevant provision did conclude as under

The power of Court to cancel bail if it considers it necessary is preserved in cases where a person has been released on bail u/s 437(1) or (2) and these provisions

are applicable to a person who has been released u/s 167(2). u/s 437(2) when a person is released pending inquiry on the ground that there are sufficient grounds to believe that he had committed a non-bailable offence may be committed to custody by court which released him on bail if it is satisfied that there are sufficient grounds for so doing after inquiry is completed. As the provisions of Section 437(1)(2) and (5) are applicable to a person who has been released u/s 167(2) the mere fact that subsequent to this release a challan has been filed is not sufficient to commit him to custody. In this case the bail was cancelled and the appellants were ordered to be arrested and committed to custody on the ground that subsequently a charge sheet had been filed and that before the appellants were directed to be released u/s 167(2) their bail petitions were dismissed on merits by the Sessions Court and the High Court. The fact that before an order was passed u/s 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action u/s 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so u/s 437(5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds such as tampering of the evidence or that his being at large is not in the interests of justice. But it is necessary that the Court should proceed on the basis that he has been deemed to have been released u/s 437(1) and (2).

18. More or less similar view was reiterated in a case of *Raghubir Singh and Others Vs. State of Bihar*, wherein it was observed as under:

The order for release on bail may however be cancelled u/s 437(5) or Section 439(2). Generally the grounds for cancellation of bail, broadly, are interference or attempt to interfere with due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him... Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution is not completing the investigation in-sixty days after the defect is cured by the filing of a charge sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed,

19. Their Lordships in a case of *Aslam Babalal Desai vs. State of Maharashtra* (supra) after having regard to various decisions and also the decision referred to above did come to following conclusion:

The provisions of the Code, in particular Sections 57 and 167, manifest the legislative anxiety that once a person's liberty has been interfered with by the

police arresting him without a court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to Section 167(2) of the Code. It must be realized that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realize that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time stipulated, the accused would be entitled to be released on bail and the order passed to that effect u/s 167(2) would be an order u/s 437(1) or (2) or Section 439(1) of the Code. Since Section 167 does not empower cancellation of the bail, the power to cancel the bail can only be traced to Section 437(5) or Section 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted u/s 437(1) or (2) or Section 439(1) of the Code. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to Section 167(2) of the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is released on bail u/s 167(2) he cannot be taken back into custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime. The ratio of the Rajnikant case to the extent it is inconsistent herewith does not, with respect, state the law correctly.

20. Thus, consistent view of the Hon'ble Supreme Court seems to be that in a case of grant of compulsive bail, the bail cannot be cancelled simply on account of filing of the charge sheet but there must exist special reasons for doing so besides the fact that charge sheet reveals the commission of non-bailable crime.

21. The instant case though is not related to that of the matter of compulsive bail but in effect grant of bail can be said to be bail on default and therefore, it assumes the same features as it is there in case of grant of bail under Section 167(2) of the Code of Criminal Procedure.

22. Therefore, the principle which has been laid down in the cases, referred to above, can easily be applied to consider as to whether cancellation of bail, in the circumstances stated above, appears to be justified.

23. As I have already stated that the bail has been cancelled for the reason that the petitioners have wrongly been granted bail and that sanction for prosecution has been accorded which in view of the law laid down by the Hon'ble Supreme Court in the cases referred to above; cannot be said to be justified and therefore, the impugned order is hereby set aside.

24. So far the case referred to the Vigilance is concerned, it is true that the Hon"ble Supreme Court in a case referred to on behalf of the Vigilance has been pleased to hold that apart from the ground available under the provision of the Code for cancellation of bail, the bail can also be cancelled if the order granting bail suffers from serious infirmity resulting into miscarriage of justice. The said proposition has been laid down on the fact of the case and on being found that the High Court has exercised its discretionary power in arbitrary and casual manner as the order granting bail has been passed ignoring the relevant material. Therefore, in the fact and circumstances the case, referred to above, does not seems to be applicable.

25. The matter is remanded back to the court concerned for its reconsideration in accordance with the law laid down as referred to above in the matter relating to cancellation of bail. Accordingly, both the applications stand disposed of.