
(2013) 01 RAJ CK 0102

In the Rajasthan High Court

Case No : Criminal Miscellaneous Cancellation of Bail Application No. 4674 of 2011

Smt. Madhuri Sharma

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 15-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 167, 167(2), 437, 439
Penal Code, 1860 (IPC) — Section 120B, 406, 420, 467, 468

Citation : (2013) 2 RLW 1432

Hon'ble Judges : Prashant Kumar Agarwal, J

Bench : Single Bench

Advocate : M.C. Taylor, for the Appellant; Laxman Meena, Public Prosecutor for the State and Mr. R.D.S. Naruka, for the Respondent

Final Decision : Allowed

Judgement

Prashant Kumar Agarwal, J.—Heard learned Counsel for the parties. The complainant-petitioner has filed this application u/s 439(2) Cr.P.C. with a prayer to cancel the bail granted to the accused-respondent by the Co-ordinate Bench of this Court vide order dated 18.2.2011 in S.B. Criminal Misc. Bail Application No. 1106/2011.

2. Brief relevant facts for the disposal of this application may be stated as below:-

(i) The petitioner filed a complaint for offences under Sections 420, 406, 467, 468, 471 read with Section 120B IPC against the respondent and some other accused before Judicial Magistrate No. 8, Jaipur City, Jaipur and the same was sent for investigation to Police Station, Shastri Nagar, Jaipur u/s 156(3) Cr.P.C. and on that basis FIR No. 113/2008 was registered for the aforesaid offences and investigation commenced.

(ii) During investigation the respondent was arrested on 27.8.2008 and he was sent to police custody upto 30.8.2008 by the Court vide remand order dated

28.8.2008. His bail application filed u/s 437 Cr.P.C. was dismissed by the aforesaid Court and application u/s 439 Cr.P.C. was dismissed by the Additional Sessions Judge No. 3, Jaipur City, Jaipur vide order dated 12.9.2008 in Criminal Misc. Bail Application No. 249/2008.

(iii) Thereafter, the respondent filed S.B. Criminal Misc. Bail Application No. 8042/2008 before this Court u/s 439 Cr.P.C. and the same was dismissed by Hon"ble Mr. Justice M.N. Bhandari vide order dated 22.11.2008 on merit.

(iv) After investigation charge-sheet was filed on 25.11.2008 before Judicial Magistrate No. 8, Jaipur City, Jaipur and on that basis Criminal Case No. 482/2008 was registered.

(v) The respondent filed an application on 25.11.2008 itself for release on bail u/s 437 read with Section 167(2) Cr.P.C. on the ground that the charge-sheet has been filed after expiry of 90 days and therefore, he is to be compulsorily released on bail. The learned Magistrate dismissed the application vide order dated 28.11.2008 with a finding that the charge-sheet has been filed on 90th day from the date of first order of remand of the respondent.

(vi) The respondent then filed application for bail u/s 439 read with Section 167(2) Cr.P.C. on the same ground and it was allowed by the Additional Sessions Judge No. 3, Jaipur City, Jaipur vide order dated 5.1.2009 in Criminal Misc. Bail Application No. 500/2008 with a finding that the charge-sheet has been filed after expiry of 90 days. According to the Court the period of 90 days expired on 24.11.2008.

(vii) The State of Rajasthan moved application u/s 439(2) Cr.P.C. before the High Court for cancellation of bail granted to the respondent which was registered as S.B. Criminal Misc. Application (Cancellation of Bail) No. 3447/2009 but the same was dismissed as not pressed vide order dated 27.7.2009 and 7.8.2009 with liberty to file application for cancellation of bail u/s 439(2) Cr.P.C. before the Sessions Judge, Jaipur City, Jaipur.

(viii) In pursuance of the aforesaid liberty, the State of Rajasthan filed application for cancellation of bail u/s 439(2) Cr.P.C. before the learned Sessions Judge, Jaipur City, Jaipur in the year 2009 itself and the same was registered as Criminal Application No. 3342/2009. This application for cancellation of bail was dismissed by the learned Sessions Judge vide order dated 13.11.2010 on the ground that efforts to serve the notice on the respondent have failed. The learned Sessions Judge ordered to consign the file to record without considering the application on merit.

(ix) In the meanwhile, the respondent during trial absented from the trial Court on 27.10.2010 and therefore, his bail bonds were forfeited and it was ordered that he may be summoned by way of warrant of arrest. It appears that during trial the respondent personally appeared before the trial Court on 8.2.2010 and on each and every subsequent date fixed, he sought exemption from personal

appearance and ultimately did not appear on 27.10.2010.

(x) The respondent was arrested by the Police only on the direction made by the High Court in Criminal Misc. 5th Bail Application No. 10985/2010 filed by the co-accused-Pooran Mal vide order dated 16.12.2010. After his arrest on 21.1.2011, the respondent moved application for grant of bail u/s 437 Cr.P.C. but the same was dismissed by the trial Court vide order dated 22.1.2011. It is to be noted that in the order dated 22.1.2011, the case number was wrongly mentioned as 482/2006 whereas the correct number was 482/2008.

(xi) The respondent then filed application u/s 439 Cr.P.C. before the Additional Sessions Judge No. 8, Jaipur Metropolitan, Jaipur as Criminal Misc. Bail Application No. 101/2011 but the same was dismissed vide order dated 25.1.2011. In this order also the case number was wrongly mentioned as 482/2006.

(xii) Thereafter, the respondent filed S.B. Criminal Misc. Bail Application No. 1106/2011 before this Court and the same was allowed by the Co-ordinate Bench vide order dated 18.2.2011. In the aforesaid bail application, FIR number was not mentioned and the number of criminal case pending before the trial Court was mentioned as 482/2006 whereas the correct case No. is 482/2008. In the bail application this fact was also not mentioned that the regular bail application moved by the respondent during investigation has been dismissed by the Co-ordinate Bench on merit vide order dated 22.11.2008 in S.B. Criminal Misc. Bail Application No. 8042/2008 and the respondent was granted benefit of bail by the learned Additional Sessions Judge No. 3, Jaipur City, Jaipur vide order dated 5.1.2009 u/s 167(2) Cr.P.C. due to the reason that charge-sheet was not filed within the prescribed period of 90 days. This fact was also not disclosed in the application that the State Government moved application for cancellation of bail u/s 439(2) Cr.P.C. and the same was dismissed by the Sessions Judge, Jaipur City, Jaipur vide order dated 13.11.2010 due to the reason that respondent could not be served.

(xiii) The co-accused-Pooran Mal Saini filed S.B. Criminal Misc. Bail Application No. 7341/2008 before this Court but the same was dismissed by the Co-ordinate Bench on merit vide order dated 19.12.2008. The co-accused filed second application for grant of bail before the High Court which was registered as S.B. Criminal Misc. 2nd Bail Application No. 948/2009 and the same was dismissed by the same Co-ordinate Bench on merit vide order dated 13.2.2009. During the course of hearing this fact was brought to the knowledge of learned Co-ordinate Bench that despite dismissal of application of bail moved by the respondent on merit vide order dated 22.11.2008, he was enlarged on bail pursuant to the provisions of Section 167(2) Cr.P.C. as the charge-sheet could not be filed within the time prescribed. The Co-ordinate Bench issued notice to the concerned investigating officer and the file was ultimately closed vide order dated 23.11.2010 by the reason that it was stated before the Co-ordinate Bench that warrant of arrest has been issued against the respondent on account of bail jump

and he is likely to be arrested soon. The co-accused-Shri Pooran Mal in the meanwhile moved third application for grant of bail which was registered as S.B. Criminal Misc. 3rd Bail Application No. 6032/2009 and the same was dismissed vide order dated 11.8.2009. It was also directed to the Public Prosecutor to inform the Court with regard to the progress of cancellation of bail granted to the respondent. Thereafter, the co-accused filed 4th bail application which was registered as S.B. Criminal Misc. 4th Bail Application No. 5259/2010. During the course of hearing of the aforesaid bail application it was brought to the knowledge of the Co-ordinate Bench that the respondent is avoiding service of notice issued by the Sessions Judge in application for cancellation of bail filed against him. Vide order dated 27.7.2010 It was directed that the Court below is expected to get the notices served for cancellation of bail upon the respondent by passing the appropriate orders. The 4th bail application filed by the co-accused-Shri Pooran Mal was ultimately dismissed by the Co-ordinate Bench vide order dated 16.11.2010 as no one appeared on his behalf on the date fixed. Thereafter, co-accused-Shri Pooran Mal Saini moved 5th application for grant of bail before the High Court and the same was registered as S.B. Criminal Misc. 5th Bail Application No. 10985/2010 and the same was dismissed by the Coordinate Bench vide order dated 1.2.2011. During the course of hearing of the aforesaid bail application, it was brought to the knowledge of the Co-ordinate Bench that the respondent, the main accused, has been arrested who was earlier absconding and therefore, it was directed to the trial Court that it would complete the trial within the specified period keeping in mind the provisions of Code of Criminal Procedure.

3. It was submitted by the learned Counsel for the petitioner that the respondent by concealment of material facts and misrepresenting the Court obtained order of bail from the Co-ordinate Bench in S.B. Criminal Misc. Bail Application No. 1106/2011 and if all relevant facts including the fact that his first bail application has been rejected by the other Co-ordinate Bench on merit vide order dated 12.11.2008 and benefit of bail was accorded to him u/s 167(2) Cr.P.C. would have brought to the knowledge of the Hon'ble Co-ordinate Bench, benefit of bail could not have been accorded to him. According to learned Counsel for the petitioner in the bail application moved before the Co-ordinate Bench, FIR number was not disclosed and this fact was also not disclosed that this is second application for grant of bail and therefore, file of the previous application was not tagged with the file and the matter was not listed before the Co-ordinate Bench which dismissed the earlier application filed by the respondent. According to learned Counsel the respondent mentioned wrong case number of the trial Court. It was further submitted that according to Rule 65 of the Rajasthan High Court Rules, the Bail Application No. 1106/2011 should have been listed before the previous Co-ordinate Bench which dismissed the first application of the respondent but due to concealment of material facts and mis-representation made by the respondent, the same could not be done. According to learned Counsel for the petitioner existence of supervening circumstances is not the

requirement in each and every case for cancellation of bail which has already been granted to an accused and even if the order is found to be illegal and has been obtained by fraud, concealment of material facts and mis-representation, the same can be cancelled by the Court. It was submitted that the respondent and the co-accused cheated the complainant-petitioner on the basis of forged documents and obtained a huge sum of money from her and the respondent is the main accused and therefore, in view of the fact that the Co-ordinate Bench of this Court has dismissed even 6th bail application of the co-accused-Shri Pooran Mal Saini, the bail order of the respondent is also to be cancelled more particularly in view of the fact that same has been obtained by mis-representation, fraud and concealment of material facts.

4. In support of his submissions, learned Counsel for the petitioner relied upon the cases of Sita Ram Vs The State of Rajasthan reported in 1994 (1) WLC 108 (Raj.) and Dr. Narendra K. Amin Vs. State of Gujarat and Another,

5. On the other hand, learned Counsel for the accused-respondent submitted that it is an admitted fact that the respondent was released on bail by obtaining benefit of Section 167(2) Cr.P.C. as the charge-sheet could not be filed within the prescribed period of 90 days and therefore, dismissal of his bail application by the Co-ordinate Bench vide order dated 22.11.2008 is of no relevance and it cannot be said that in S.B. Criminal Misc. Bail Application No. 1106/2011 material facts were concealed or respondent committed fraud with the Court or by mis-representing the facts obtained order of bail. According to learned Counsel for the respondent in the order passed by the trial Court as well as by the Additional Sessions Judge, case number was mentioned as 482/2006 and on that basis in the aforesaid bail application also the same case number was written and therefore, it can not be said that the respondent willfully mentioned wrong case number with the object that file of the previous bail application is not tagged with the file of the aforesaid bail application. It was also submitted that the respondent could not appear before the trial Court during trial and as a consequence thereof, his bail bonds were forfeited and in compliance of issuance of warrant of arrest, he was arrested and produced before the trial Court and his application for grant of bail was dismissed by the trial Court as well as by the Additional Sessions Judge and as the application for grant of bail was filed before this Court against the order of forfeiture of bail already granted to the respondent, the bail application was to be listed before the regular bench hearing the bail matters and not before the Co-ordinate Bench which dismissed the regular bail application vide order dated 12.11.2008. According to learned Counsel for the respondent it is well settled legal position that bail once granted cannot be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. It was submitted that it is not the case of complainant-petitioner as well as prosecution that after obtaining benefit of bail respondent in any way interfered in the course of trial by winning over the prosecution witnesses or

otherwise. According to learned Counsel for the respondent merely because the respondent absented himself during trial and he appeared before the trial Court only when the police arrested him in compliance of the warrant of arrest, it cannot be said that the respondent has misused the liberty given to him.

6. In support of his submissions, learned Counsel for the respondent relied upon the case of Dolat Ram and Others Vs. State of Haryana,

7. I have considered the submissions made on behalf of the respective parties and also gone through the material made available for my perusal as well as the relevant legal provisions and the case law.

8. In the case of Dolat Ram and Others Vs. State of Haryana, it has been held by Hon"ble Supreme Court that :-

Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and non exhaustive) are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

9. In the case of Dr. Narendra K. Amin Vs. State of Gujarat and Another, it has been held by the Hon"ble Supreme Court that "once it is found that bail was granted on untenable grounds, same can be cancelled. The stand that there was no supervening circumstances has no relevance in such a case."

10. In the case of Dinesh M.N. (S.P.) Vs. State of Gujarat, a Bench of three Hon"ble Judges of the Supreme Court has held that although the parameters for grant of bail and cancellation of bail are different but where the bail has been granted to an accused taking into consideration irrelevant materials which is of substantial nature, the bail so granted can be cancelled by the Court.

11. Similarly, in the case of Subodh Kumar Yadav Vs. State of Bihar and Another, it has been held by Hon"ble Supreme Court that if a superior Court finds that Court granting bail had acted on irrelevant materials, or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety e.g. failure to hear Public Prosecutor/complainant where required, order for cancellation of bail can be made.

12. Similar view has also been taken in the case of Manjit Prakash and Others

Vs. Shobha Devi and Another,

13. Recently, in the case of Prakash Kadam and Vs. Ramprasad Vishwanath Gupta and Another, , Hon"ble Court has held that it is not an absolute rule that considerations of bail are different from the consideration of grant of bail; it will depend on the facts and circumstances of the case. In considering whether to cancel the bail the court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. There is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.

14. For the disposal of this Application Rule 65 of the Rajasthan High Court Rules, 1952 is also relevant which is as below:-

Subsequent application on the same subject to be heard by the same Bench. No application to the same effect or with the same object, as a previous application upon which a Bench has passed any order other than an order of reference to another Judge, shall, except by way of appeal, ordinarily be heard by any other Bench.

The application when presented by or on behalf of the person by whom or on whose behalf such previous application was made shall give the necessary particulars of such previous application, the nature and the date of the order passed thereon and the name or names of the Judge or Judges by whom such order was passed.

15. Relying upon the aforesaid rule, Division Bench of this High Court consisting of Hon"ble G.M. Lodha & S.N. Bhargava, JJ in the case of Parsadi Vs. State of Rajasthan reported in 1983 Cr.L.R.(Raj.) 222 was pleased to place D.B. Criminal Misc. IIIrd Bail Application No. 172/1983 before the Division Bench consisting of Hon"ble N.M. Kasliwal and Hon"ble Bhargava, JJ who disposed of the earlier bail application on the ground that the subsequent bail application should also be considered and decided by the Bench which decided the earlier bail application. It was observed by the learned Division Bench that Rule 65 should be followed in letter and spirit and the Office should take appropriate steps to ensure its compliance in future.

16. If in the light of prevalent legal position, the facts and circumstances of the present case are considered, the present application filed by the complainant is liable to be allowed and the bail order dated 18.2.2011 is to be cancelled as it is very clear that the same has been obtained by concealment of material and relevant facts and also committing fraud upon the Court. Although, it cannot be said that the accused-respondent wilfully mentioned wrong case number in S.B. Criminal Misc. Bail Application No. 1106/2011 as it appears that the same has

been mentioned on the basis of orders passed by the Courts below which actually bear wrong case number but it is revealed that in the aforesaid bail application it was not mentioned that it is second application for grant of bail and the earlier bail application moved by the respondent during investigation was dismissed by the Co-ordinate Bench on merit vide order dated 22.11.2008 in S.B. Criminal Misc. Bail Application No. 8042/2008. In the bail application, number of the FIR was also not mentioned whereas it was required to be mentioned so that the office can check whether in respect of the same FIR earlier bail application has been filed or not. In the bail application this fact was also not mentioned that the respondent was given benefit of bail by the Additional Sessions Judge No. 3, Jaipur City, Jaipur vide order dated 5.1.2009 passed u/s 167(2) Cr.P.C. by the reason that charge-sheet could not be filed within the prescribed period of 90 days. From the tone of order dated 18.2.2011 it appears that it was submitted before the Court that it is a simple case of non-appearance of the respondent during trial for some period of time and therefore, he is required to be enlarged on bail as he has now been arrested by the police in compliance of warrant of arrest issued by the trial Court and is in custody since long. I am of the view that if the aforesaid material facts would have brought to the knowledge of the learned Co-ordinate Bench which allowed the S.B. Criminal Misc. Bail Application No. 1106/2011, it would have ordered to list the matter before that Hon"ble Single Bench which considered and dismissed the earlier application filed by the respondent. Apart from that, there is another reason to cancel the order dated 18.2.2011. From the facts available on record it is clear that the State Government moved application for cancellation of bail u/s 439(2) Cr.P.C. before the learned Sessions Judge in the year 2009 and notices were issued to the respondent but despite efforts being made, the same could not be served upon him and in the meanwhile the respondent absented himself from the trial Court on 27.10.2010 so that the aforesaid notices could not be served upon him through trial Court.

17. The respondent thereafter appeared before the trial Court only on 21.1.2011 when he was arrested by the police in compliance of the warrant of arrest issued by the trial Court and that too when taking serious view of the matter specific direction was made by the Co-ordinate Bench in Criminal Misc. 5th Bail Application No. 10985/2010. It is thus, clear that the respondent misused the liberty given to him by way of order of bail and due to his absence the trial could not further progress despite the fact that co-accused-Shri Pooran Mal Saini was in custody. It also appears that while on bail on most of the dates fixed, the respondent did not personally present before the trial Court and appeared through his counsel.

18. Yet, there is one more ground to cancel the bail granted to the respondent and it is by the reason that learned Additional Sessions Judge No. 3 wrongly gave benefit of Section 167(2) Cr.P.C. to him with a finding that charge-sheet has been filed after expiry of 90 days whereas the charge-sheet was filed on 90th day as held by the trial Court as it is well settled that the period of 90 days is to be

calculated from the date of first order of remand and not from the date on which the accused has been arrested and the day of arrest is to be excluded to calculate the period of 90/60 days as prescribed in the aforesaid provision. In the present case, the respondent was arrested on 27.8.2008 and he was produced before the learned Magistrate on 28.8.2008 and he was sent to police custody upto 30.8.2008. If calculated from the date of order of remand i.e. 28.8.2008, the 90th day expires on to 25.11.2008 on which date admittedly the charge-sheet was filed. Recently Hon"ble Supreme Court in the case of Pragyan Singh Thakur Vs. State of Maharashtra reported in (2011) 2 SCC 445, relying upon many previous decisions of the same Court has held that the relevant date of counting 90 days for filing the charge-sheet is the date of first order of remand and not the date of arrest. It was also held by the Hon"ble Court that "the right u/s 167(2) Cr.P.C. to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits." In the present case, even if for the sake of arguments it is admitted that the charge-sheet was not filed within the period of 90 days but no order was passed to release the respondent before the charge-sheet was filed as the application filed by the respondent on 25.11.2008 was dismissed by the learned Magistrate vide order dated 28.11.2011 and the benefit of Section 167(2) Cr.P.C. was accorded to the respondent by the learned Additional Sessions Judge only vide order dated 5.1.2009 but before that admittedly charge-sheet was filed on 25.11.2008. In such circumstances, the Additional Sessions Judge was not entitled to invoke the provisions of Section 167(2) Cr.P.C. in favour of the respondent.

19. It is well settled legal position that if a person has been illegally or erroneously released on bail u/s 167(2) Cr.P.C., his bail can be cancelled by appropriate order u/s 439(2) Cr.P.C. as proviso to Section 167 Cr.P.C. itself clarifies that every person released on bail u/s 167(2) Cr.P.C. shall be deemed to be so released under Chapter-XXXIII Cr.P.C. The concept of setting aside unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. u/s 439(2) Cr.P.C. the approach should be whether the order granting bail was vitiated by any serious infirmity for which it is right and proper for the High Court, in the interest of justice, to interfere. The power vested in the High Court u/s 439(2) Cr.P.C. can be invoked either by the State or by any aggrieved party. The said power could also be exercised suo-moto by the High Court. It is always open to the High Court to cancel the bail if it feels that there are sufficient and enough and

reasons for doing so. The High Court being superior Court in the hierarchy of Courts, can cancel even bail granted by the Sessions Court u/s 439(2) Cr.P.C. and it is not necessary to first approach the Sessions Court for its cancellation. In the present case, as the learned Additional Sessions Judge wrongly invoked its jurisdiction u/s 167(2) Cr.P.C. mis-calculating the period of 90 days and illegally and erroneously released the respondent on bail vide order dated 5.1.2009, I am of the considered view that it is a fit case in which the power conferred by Section 439(2) Cr.P.C. is to be suo-moto invoked and I hereby invoke that power. Consequently, the application filed u/s 439(2) Cr.P.C. is allowed and the order of bail passed in favour of the respondent is cancelled and he is directed to be taken in custody. The respondent is directed to surrender before the trial Court within a period of seven days from today failing which necessary steps shall be taken by the trial Court to ensure his production before the Court.