
(1978) 04 BOM CK 0003

In the Bombay High Court

Case No : Criminal Application No. 214 and 215 of 1978

The State of Maharashtra

APPELLANT

Vs

Vishwas Shripati Patil

RESPONDENT

Date of Decision : 04-04-1978

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 436, 437, 438, 439, 482

Citation : (1978) 80 BOMLR 432 : (1978) MhLj 746

Hon'ble Judges : Masodkar, J; Kanade, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Masodkar, J.—These two applications are filed by the State purporting to be under Article 227 of the Constitution of India and also u/s 482 read with Section 439(2) of the Code of Criminal Procedure and challenge mainly the order passed by the Additional Sessions Judge, Kolhapur, refusing to entertain an application for cancellation of an order directing release of the accused persons u/s 438 of the Code of Criminal Procedure. Effective order has been made to this effect rejecting Miscellaneous Criminal Application No. 22 of 1978, while there is no effective application with regard to order made in Miscellaneous Criminal Application No. 21 of 1978. Upon the first rejection, the State has moved these two separate petitions.

2. It is not necessary in these two applications to examine in closer details the validity of the orders made by the learned Additional Sessions Judge rejecting the application of the State for cancellation of the Orders under Sections 438 as premature both for the State as well for the accused, written Purshis has been filed that these Miscellaneous Criminal Applications should be disposed of on merits and the same should be decided by the Sessions Judge, Kolhapur, himself or by any other Additional Sessions Judge, Kolhapur, excepting the learned Judge who made the impugned order. The terms are set out in the written Purshis and

Mr. Paranjpe for the accused has subscribed to the same. Particularly, the accused have undertaken as stated in paragraph 5 of the said written Purshis that all of them except accused No. 4 Lala Saheb Sadashiv Patil would report to the Shahuwadi police station every morning between 9.00 a.m. and 10.00 a.m. and make themselves available for interrogation during the course of the day till further orders are passed by the learned Sessions Judge in these Miscellaneous Criminal Applications. It is treated as an undertaking to the Court. It is further agreed between the parties that these Miscellaneous Criminal Applications should be heard by the learned Sessions Judge in the week beginning from April 10, 1978. All the accused except accused No. 4 Lala would remain present on April 10, 1978 in the Court of the Sessions Judge, Kolhapur.

3. We have acceded to this joint Purshis for we felt that prima facie the view of the learned Judge that no application for cancellation of anticipatory bail order lies unless accused is arrested appears to us to be unsustainable and further because we feel that the initial order made by the learned Additional Sessions Judge is not made in accordance with the principles laid down by the Supreme Court in the case of *Balchand v. State of M.P.* A.I.R.[1977] S.C. 366, for it does appear that before making the order the learned Judge did not issue notice to the State nor the order records any reason as to why it was not possible to serve the notice on the State. Moreover, from the order it is apparent that it merely records that there was reasonable apprehension in the mind of the applicants that they might be arrested but it does not record any finding as to why anticipatory bail order is necessary or being made. The provisions of Section 438 are not to be mechanically applied. They operate upon the reasonable apprehension of having been concerned with the commission of non-bailable offence and require the Court to make an order consistently to indicate the reasons as to why the Court is inclined to make the orders of bail in anticipation of arrest of such person. The phraseology "if it deems fit" available in the body of the section reading with Sub-section (2) thereof is indicative enough that such order on the face of it must show the reasons for making the order. The initial order herein suffers from this infirmity in that it does not disclose any reason why the order as to anticipatory bail was being made and further the rule of prudence of giving notice to the other side before passing the anticipatory bail was not being followed. In *Balchand's* case Supreme Court in the terms laid down the practice of prudence of making in urgent cases only interim order and confirming it after notice to opposite party.

5. We may further observe that enabling power like the one conferred by Section 438 operates both for making as well cancelling or recalling the order so made. By the very nature the orders of bail under chap. XXXIII of the Code of Criminal Procedure under any of the sections from Sections 436 to 439 are to be viewed as orders permitting judicial release of persons accused of offences upon their entering in bonds as may be specified by the orders. The very character of such orders is interim or tentative and temporary and as such liable to be recalled, revoked or changed circumstances so permitting. Power to grant bail and make

orders in that regard available in Sections 436 to 439 are meant to be exercised as and when occasion for its exercise arises. By its very nature such orders of bail do not possess irreversible finality. Law does not inhibit cancellation or revocation of such orders. In this context when Section 438 permits of making of an order and order is made granting anticipatory bail, it is implicit that the Court making such an order is entitled upon appropriate consideration to cancel or recall the same. It is not necessary for such purposes to find out any further specific provision conferring power of cancellation. That in fact flows from the very character of enabling power so enacted. The term "bail" connotes security for prisoner's appearance and its effect is simply the temporary release of the person pending trial.

6. Further scrutiny of the provisions of Section 439(2) clearly show that those provisions are in addition and/or independent of this implicit power that vests in the Court to recall or cancel such orders. Provisions of Section 439(2) are not exclusive provisions in that regard so as to achieve the purposes of cancellation of orders of bail. The words in this Sub-section to the effect "has been released on bail under this Chapter" are qualifying denoting the condition of a person who upon order may be arrested and committed to custody. It is important to notice that this clause contains the debated phrase "released on bail". The Chapter postulates two types of release on bail, viz., release after arrest and release from arrest; the first wherein the arrest is accomplished while in the second it is in anticipation. The words "released on bail" clearly cover both types of cases. Particularly under the provisions of Section 438 and orders made thereunder in favour of the person accused of an offence admitting him to anticipatory bail; nonetheless such a person equally answers the description of a person who had been released on bail in the sense admitted to bail by Court. The provisions of Sub-section (2) of Section 439 are intended clearly to recall, revoke or cancel the orders as to bail and those are operative upon the purposes of directing arrest of persons and committing them to custody. Therefore, in all cases, wherever the competent authority or Court makes an order admitting persons accused of offences to bail, the provisions of this Sub-section are clearly attracted. Moreover, the phraseology available in the Sub-section using the words like "has been released on bail" will have to be understood in the context of orders that are liable to be made and are made under the provisions of the entire Chapter. Specifically these being the provisions of Sections 436 to 439(1), Section 439 being inclusive, it is obvious that the power conferred by Sub-section (2) is intended to be operative upon and over all types of orders of bail made under the Chapter. In the matter of anticipatory bail and its contest stage of arrest will not necessarily precede and yet the person in whose favour such an order is made would be a person who has been released on bail in anticipation of his arrest or apprehended arrest. Sub-section (1) of Section 438 confers powers to give directions that in the event of such person's arrest he shall be released on bail. Sub-section (2) deals with the conditions that may form part of such directions. Sub-section (3) then states that if such person is thereafter arrested without

warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that persons, he shall issue aailable warrant in conformity with the direction of the Court under Sub-section (1). The provisions are thus in two parts. First that are contained in Sub-section (1), which is a power to give direction, and second that are contained in Sub-section (3), which statutorily imposes an obligation on the authorities mentioned therein to release a person in accordance with the directions. Thus making of the order with regard to anticipatory bail arms the person with the direction which has to be given effect to as provided by Sub-section (1). It shows that direction given in anticipation of arrest with regard to bail is effective and has to be obeyed by the authorities mentioned in Sub-section (5) in the manner indicated therein. Thus, the person who has been admitted to the anticipatory bail is really a person who answers the terminology in the sense that he has been released on bail under this Chapter.

7. It is not possible to introduce and read the phrase as "who has been released on bail after his arrest under this Chapter". That would require an addition not necessary and would curtail the scope of the section. Reasonable reading of the words in the context of the provisions of Section 438 and other provisions merely indicate the person in whose favour order of bail has been made. If we are not to give this meaning, then cases would arise where after obtaining the orders u/s 438(1), the persons accused of offences may avoid the arrest or processes ofailable warrants issued by the Court and yet cancellation would not be possible. Are we to suppose that in such eventualities the Court is rendered powerless because order has been made and arrest has not been effected? That interpretation which will subserve the obvious object and suppress possible mischief will have to be placed on such permissive terminology available in Sub-section (2) of Section 439 of the Code. Intention underlying enactment of Sub-section (2) of Section 439, which is an independent provision, is clear; in that the High Court or the Court of Sessions is empowered to direct the arrest and commitment of the persons to custody who have been admitted to bail under any of the provisions contained in the Chapter. Prima facie, therefore, we find that the view taken by the learned Judge is erroneous.

8. As stated above, both the learned Counsel have filed joint request and upon the observations we have made the request is well merited. Taking this view, we allow both these applications and direct the Sessions Judge, Kolhapur, to hear Miscellaneous Application No. 22 of 1978 filed by the State and if any other such application is filed arising out of Miscellaneous Criminal Application No. 21 of 1978 on its own merits and decide the same according to law. Meanwhile, status quo under or as per the order made by the learned Sessions Judge, Kolhapur, will continue till any effective contrary order is made by the learned Sessions Judge, after hearing both the parties. Rules absolute.