IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

947 CRIMINAL WRIT PETITION NO.1672 OF 2022

BRIJESH INDRAMANI SHUKLA
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

Mr. Shrikishan S. Shinde, Advocate for the petitioner
Mr. P. P. Giri, Advocate for respondent No.2
Mr. S. R. Yadav-Lonikar, APP for the respondents/State

CORAM : KISHORE C. SANT, J.
DATE : 04th JANUARY, 2023

P. C.

1. This criminal writ petition is filed by the original accused challenging an order below Exh. No.1 passed by the learned Additional Sessions Judge, Aurangabad dated 09-11-2022 by which the order granting bail to the accused in Criminal Case No. 3313/2021 came to be cancelled.

2. The facts necessary for the decision are that an FIR came to be registered on 24-12-2020 bearing Crime No. 805/2022 with Cidco Police Station, Aurangabad for the offences punishable under Section 420 read with Section 34 of the Indian Penal Code and Section 66(C) and 66(D) of the Information Technology Act, 2000 against unknown persons. In the investigation name of this accused was revealed who is

shown as accused No.2. Accused No.1 Ashishkumar Maurya came to be arrested on 30-08-2021. However, present petitioner was not found. After investigation charge-sheet came to be filed. This petitioner was shown to be absconded and therefore, report under Section 299 was filed against him. Subsequently, this petitioner came to be arrested on 21-04-2022. He applied for a bail and same was rejected. Thereafter, he filed an application for bail in this court. When the application before this court was pending the accused file an application in the trial court seeking default bail under Section 167 (2)(ii) saying that no supplementary or default charge-sheet is filed by the prosecution. The learned JMFC was pleased to grant bail by judgment and order dated 13-09-2022 holding that though the petitioner was in jail no supplementary charge-sheet or default charge-sheet is filed.

3. The informant respondent No.2 filed Misc. Criminal Application No.280/2022 in the court of learned Sessions Judge, Aurangabad for cancellation of the bail on the ground that there was no question of grant of default bail under Section 167(2) since the charge-sheet was already filed. The petitioner was arrested much after filing of the charge-sheet and therefore, order granting bail is erroneous. It is further pointed out to the court that while framing of the charge, the petitioner was present and his statement was recorded showing that he was having copies of police papers. Further it was contended that the

application under Section 167(2) of the Cr. P. C. can be considered only when the accused is ready and prepared to furnish the bail. In this case, accused did not offer bail on that day of his application. He instead prayed for time to give cash surety for a period of three weeks. This is against a mandate of section 167 etc.

4. The learned Sessions Judge considered all these grounds and came to a conclusion that bail ought not to have been granted under Section 167(2) of the Cr. P. C. It is observed that learned Magistrate has failed to consider the legal position.

5. The petitioner is thus before this court. First ground raised by the petitioner is that the application for cancellation of bail was not maintainable since the application was filed under Section 439(2) whereas bail application was under different chapter under Section 162 (6)(7) which falls under Chapter 12 whereas Section 439 is under Chapter XXXIII. Further he submits that while seeking PCR the prosecution itself had stated the reason seeking PCR that the investigation is in progress to show that the charge-sheet or supplementary charge-sheet was to be filed and no such charge-sheet was filed. It is vehemently argued that once the bail was granted by the trial court, it could not have been lightly cancelled.

6. Learned advocate for respondent No.2 vehemently

argued the case. He submits that wording of proviso to Section 167(2) shows that the bail granted under Section 167(2) shall be deemed to be under the provision of Chapter XXXIII for the purpose of that Chapter and therefore, the application filed before the learned Sessions Judge under Section 439 was very much maintainable. He further submits that when charge-sheet was already filed there was no question of applying for default bail on the ground that supplementary charge-sheet is not filed. He thereafter submits that there is no requirement of law that after a person is arrested after filing of charge-sheet a supplementary or additional charge-sheet must be filed.

7. On facts it is argued that it is transpired in the investigation that amount from the complainant was deposited in the account of this accused person and subsequently said amount is transferred in the account of accused No.1. This clearly shows the involvement of the petitioner in the offence. Though initially name of this petitioner was not shown in the FIR, however his role is now clear looking to the material collected by the Investigating authorities and now form of the part of the charge-sheet. Thus, error of law is committed by the JMFC. He submits that the bail application of the petitioner was rejected on earlier occasion. The petitioner had filed application for bail in this court. However, subsequently application filed in this court came to be withdrawn in view of application filed on the ground of default. The learned counsel for respondent No.2

in support of his submission relied upon the judgment of the Hon'ble Apex Court in the *Criminal Appeal No. 801/202 passed in the case of Venkatesan Balasubramaniyan Vs The Intelligence Officer, DRI Bangalore with connected matters*. He further relied upon the judgment delivered by the Hon'ble Apex court in the *Appeal (Cri) No. 1249/2007 in the case of Dinesh Dalmia Vs CBI*. He further relied upon in the case reported in *2005 SCC On Line Bombay 1428 in the case of Anil Somdatta Nagpal and others Vs State of Maharashtra*.

8. Learned APP for the State opposed the petition and supported the impugned order. He adopted argument of respondent No. 2. He further submitted that in the investigation it is clearly appearing that this petitioner is very much involved in the offence. The complainant was asked to deposit amount in the account of this petitioner. It is this petitioner who later on transferred the amount in the account of accused No.1.

9. To appreciate the submission, it would be useful to consider judgments relied upon by respondent No. 2. In the first judgment in the case of *Vyankatesan Balasubramaniyan* (supra) in para No. 10 the Hon'ble Apex Court has held that bail granted under Section 167 (2) of the Cr. P. C. can be cancelled under Section 439(2) by considering the judgment reported in *(2008) 17 SCC 745 in the case of Pandit Dnyanu Khot Vs State of Maharashtra Ors*. It is further held in that case that the High

Court had committed basic error in not referring the provisions of 439(2) which empowers to cancel such bail. For ready reference para No. 10 is reproduced as under:-

> 10. It is true that the bail granted under Section 167(2) Cr.P.c. could have been cancelled under Section 439(2) Cr.P.C.. This Court in Pandit Dnyanu Khot Vs. State of Maharashtra and Ors. (2008) 17 SCC 745 while considering the case where bail granted under Section 167(2) Cr.P.C. was cancelled under Section 439(2) Cr.P.C. by learned Sessions Judge after noticing the facts upheld the order under Section 439 Cr.P.C. cancelling the bail. Paragraphs 7, 8 and 9 of the judgment are as follows:-
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> "7. In the present case, against the accused, FIR for the offences punishable under Sections 302, 307, 147, 148, 149, 324 and 323 IPC and Section 27 of the Arms Act was registered. The accused were arrested on 28-10-2000 and were produced before the Judicial Magistrate. They filed an application under Section 167(2) CrPC on 25-1-2001 for releasing them on bail on the ground that charge-sheet was not submitted within the stipulated time and the court released them on bail on the same date by exercising jurisdiction under Section 167(2) CrPC. The State filed an application on 31-1-2001 under Section 437(5) and Section 439(2) CrPC before the Sessions Judge, Kolhapur for cancellation of bail. Before the said application could be finally disposed of, the accused preferred an application Ext. 8 submitting that an application under Sections 437(5) and 439(2) was not maintainable before the Sessions Court and the State ought to have approached the learned Magistrate for cancellation of the bail. That application was rejected by the learned Additional Sessions Judge by order dated 3-3-2001.
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> Thereafter, the learned Additional Sessions Judge by judgment and order dated 2-5-2001 allowed the said application and set aside the order passed by the Judicial Magistrate on the ground that the accused were released on the 89th day, that is, before expiry of 90 days.

> 8. In our view, it appears that the High Court has committed basic error in not referring to the provisions of Section 439(2) CrPC which specifically empower the High Court or the Court of Session to cancel such bail. Section 439(2) reads as under:
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> "439. Special powers of High Court or Court of Session regarding bail.—(1)*** (2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."
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> 9. The proviso to Section 167 itself clarifies that every person released on bail under Section 167(2) shall be deemed to be so released under Chapter XXXIII. Therefore, if a person is illegally or erroneously released on bail under Section 167(2), his bail can be cancelled by passing appropriate order under Section 439(2) CrPC. This Court in Puran v. Rambilas [(2001) 6 SCC 338] has also clarified that the concept of setting aside an 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."

10. In the case of *Dinesh Dalmia* (supra) the Hon'ble Apex Court in para Nos. 21, 22 and 29 has held as under:

> 21. It is also not a case of the appellant that he had been arrested in course of further investigation. A warrant of arrest had already been issued against him. The learned Magistrate was conscious of the said fact while taking cognizance of the offence.
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> It is now well settled that the court takes cognizance of an offence and not the offender. [See Anil Saran v. State of Bihar and another (1995) 6 SCC 142 and Popular Muthiah v. State represented by Inspector of Police (2006) 7 SCC 296]
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> 22. The power of a court to direct remand of an accused either in terms of Sub-section (2) of Section 167 of the Code or Sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas Sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, Sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.

> 29. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under Sub-section (2) of Section 173 and further investigation contemplated under Sub-section (8) thereof. Whereas only when a charge sheet is not filed and investigation is kept pending, benefit of proviso appended to Sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Sub-section (8) of Section 173 of the Code.

11. In the case of of *Anil Somdatta Nagpal* (supra), in para No. 23 this court has held as under:-

> ***If the Magistrate has taken cognizance of the offence upon police report being filed, then merely because absconding accused surrenders at a later stage and is taken in custody does not mean that the period of 60 days prescribed in Section 167(2) proviso must be computed in such a manner so as to enable him to be enlarged on bail. An accused cannot contend that the court must take cognisance of his custody and not the offence.

12. Thus, in view of the discussion and in view of the clear position, this court finds that the learned Sessions Judge has not committed any error of law while cancelling bail granted to the petitioner. There is no illegality or perversity found in the order passed by the learned Sessions Judge. There is no merit in the petition. Further facts need to be taken into count is the conduct of the petitioner. The criminal writ petition is dismissed and disposed off. Ad-interim relief, granted earlier to the petitioner by order dated 28-11-2022 stands vacated.

13. At this stage, learned counsel for the petitioner prays for continuation of ad-interim relief since it has been running from 28-11-2022. Same shall be continued for a period of four weeks from today.

[KISHORE C. SANT, J.]

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