

Parvinder Singh Khurana
v.
Directorate of Enforcement

(Criminal Appeal No. 3059-3062 of 2024)

23 July 2024

[Abhay S. Oka* and Augustine George Masih, JJ.]

Issue for Consideration

The issue involved in these appeals concerns the power of the High Court or Sessions Court to grant an interim order of stay of operation of an order granting bail till the disposal of the application for cancellation of bail under sub-Section (2) of Section 439 of the Code of Criminal Procedure, 1973. Sub-Section (3) of Section 483 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) is the corresponding provision of sub-section (2) of Section 439 of the CrPC.

Headnotes[†]

Code of Criminal Procedure, 1973 – s.439 – Bharatiya Nagarik Suraksha Sanhita, 2023 – s.483(3) – Application for cancellation of bail – Power to grant an interim stay of order granting bail to be exercised only in exceptional cases:

Held: In an application made under Section 439(2) of the CrPC or Section 483(3) of the BNSS or other proceedings filed seeking cancellation of bail, the power to grant an interim stay of operation of order to bail can be exercised only in exceptional cases when a very strong *prima facie* case of the existence of the grounds for cancellation of bail is made out – While granting a stay of an order of grant of bail, the Court must record brief reasons for coming to a conclusion that the case was an exceptional one and a strong *prima facie* case is made out. [Para 20(a)]

Code of Criminal Procedure, 1973 – s.439 – Bharatiya Nagarik Suraksha Sanhita, 2023 – s.483 – An *Ex-parte* interim stay of the bail order should not be granted:

Held: As a normal rule, the *ex-parte* stay of the bail order should not be granted – The said power can be exercised only in rare and very exceptional cases where the situation demands the passing

* Author

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of such drastic order – Where such a drastic *ex-parte* order of stay is passed, it is the duty of the Court to immediately hear the accused on the prayer for continuation of the interim relief – When the Court exercises the power of granting *ex-parte* ad interim stay of an order granting bail, the Court is duty bound to record reasons why it came to the conclusion that it was a very rare and exceptional case where a drastic order of *ex-parte* interim stay was warranted. [Para 20(b)]

Code of Criminal Procedure, 1973 – s.439 – Bharatiya Nagarik Suraksha Sanhita, 2023 – s.483(3) – An ECIR was registered by respondent Enforcement Directorate for an offence punishable u/s.4 of the Prevention of Money Laundering Act – Thereafter, a complaint was filed u/s.44(1)(b) of PMLA – Appellant was arrested – By order dated 17.06.2023, the Special Court declined to grant bail u/s.167(2) of the CrPC, however, granted regular bail after recording a finding that the appellant satisfied the twin conditions for grant of bail incorporated in s.45(1)(ii) of the PMLA – Respondent-ED applied u/s.439(2) of the CrPC for cancellation of bail – On 23.06.2023, the High Court stayed the order granting bail – After several adjournments, on 22.05.2024 appellant was granted liberty to apply for interim bail:

Held: The order dated 23.06.2023 records the presence of the advocate representing the accused – However, the High Court did not hear the Advocate before granting stay – It was an *ex-parte* order of stay – The failure to hear the advocate for the accused and the failure to record reasons vitiates the order of stay – The order dated 23.06.2023 indicates that stay was granted without applying mind to the merits of the prayer for grant of stay – The Court ignored that the drastic order of stay of bail order had continued for 11 months which was passed without considering the merits – From 23.06.2023 till the end of June 2024, the application for cancellation of bail was listed on 28 different dates – On perusal of the order dated 17.06.2023 passed by the Special Court granting regular bail, it records a finding that the appellant has made out a case in terms of Section 45(1)(ii) of the PMLA on the power to grant bail – There are no allegation of the misuse of liberty granted under the bail order in the application for cancellation of bail – All the grounds in the said application are on merits – After having perused the said order (17.06.2023), this Court finds that the case was not the one that could have been termed a rare and exceptional case where an

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order granting bail ought to be stayed – Therefore, the impugned orders by which the High Court granted the stay of order granting bail are set aside. [Paras 14, 15, 16, 19, 21]

Case Law Cited

Gulabrao Baburao Deokar v. State of Maharashtra [2013] 16 SCR 1181 : (2013) 16 SCC 190; *Narendra Kumar Amin v. CBI (2015) 3 SCC 417*; *Puran v. Rambilas [2001] 3 SCR 432* : (2001) 6 SCC 338 – referred to.

List of Acts

Code of Criminal Procedure, 1973; Bharatiya Nagarik Suraksha Sanhita, 2023.

List of Keywords

Bail; Regular bail; Interim stay of order granting bail; Grounds for cancellation of bail; Exceptional cases; Ex-parte interim stay of the bail order; Misuse of liberty granted under the bail order; Application of mind to the merits of the prayer for grant of stay; Section 439 of Code of Criminal Procedure, 1973; Section 483(3) of Bharatiya Nagarik Suraksha Sanhita, 2023.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 3059-3062 of 2024

From the Judgment and Order dated 23.06.2023 in CRLMC No. 4374 of 2023 and CRLMA No. 16638 of 2023 in CRLMC No. 4374 of 2023 and dated 22.05.2024 in CRLMA No. 16638 of 2023 and CRLMA No. 13874 of 2024 in CRLMC No. 4374 of 2023 passed by the High Court of Delhi at New Delhi

Appearances for Parties

Sudhanshu Shashikumar Choudhari, Sr. Adv., Ms. Madhusmita Bora, Harsh Sethi, Pawan Kishore Singh, Dipankar Singh, Anant Nigam, Raghav Luthra, Advs. for the Appellant.

Tushar Mehta, SG, Zoheb Hussain, Annam Venkatesh, Vivek Gurnani, Abhipriya, Vivek Gaurav, Samrat Goswami, Ms. Aakriti Mishra, Arvind Kumar Sharma, Advs. for the Respondent.

Digital Supreme Court Reports**Judgment / Order of the Supreme Court****Judgment****Abhay S. Oka, J.**

1. Leave granted.

ISSUE INVOLVED

2. The issue involved in these appeals concerns the power of the High Court or Sessions Court to grant an interim order of stay of operation of an order granting bail till the disposal of the application for cancellation of bail under sub-Section (2) of Section 439 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC'). Sub-Section (3) of Section 483 of Bharatiya Nagarik Suraksha Sanhita, 2023 (for short, 'the BNSS') is the corresponding provision of sub-section (2) of Section 439 of the CrPC. The same issue arises in other proceedings adopted for challenging an order of grant of bail.

FACTUAL ASPECTS

3. On 1st December 2020, the Central Bureau of Investigation registered a crime against two companies and two individuals for the offences punishable under Section 120-B read with Sections 420, 467, 468 and 471 of the Indian Penal Code and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The subject matter of offence, inter alia, was the loan account of Jay Polychem India Ltd. On 23rd February 2021, the respondent Enforcement Directorate registered an Enforcement Case Information Report (ECIR) for an offence punishable under Section 4 of the Prevention of Money Laundering Act (for short, 'the PMLA'). Eleven persons were shown as accused in ECIR. However, the appellant was not shown as an accused. On 30th October 2021, the respondent filed a complaint before the Special Court under Section 44(1)(b) of PMLA. Even in the complaint, the appellant was not shown as an accused. From 31st October 2020 to 20th January 2023, the respondent called the appellant for investigation several times. Though the appellant cooperated, on 20th January 2023, the appellant was arrested.
4. The first bail application made by the appellant was rejected by the Special Court by the order dated 10th March 2023. On 17th March 2023, the respondent filed a supplementary complaint under the PMLA in which the appellant was shown as an accused. On 29th

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April 2023, the appellant filed two separate applications seeking bail. In the first application, a prayer was made to grant a default bail under Section 167 (2) of the CrPC. The second application was for a grant of regular bail under Section 439 of the CrPC. By the order dated 17th June 2023, though the Special Court declined to grant bail under Section 167(2) of the CrPC, granted regular bail after recording a finding that the appellant satisfied the twin conditions for grant of bail incorporated in Section 45(1)(ii) of the PMLA. On 21st June 2023, the respondent applied under Section 439(2) of the CrPC before the High Court. On 23rd June 2023, the learned Single Judge of the Delhi High Court, sitting as a Vacation Judge, directed that the case should be listed before him on 26th June 2023 at 2.30 pm, and in the meanwhile, the order granting bail will remain stayed. This is the first impugned order. The hearing could not be held on 26th June 2023. On 28th June, 2023, the case was listed before another learned Single Judge who continued the interim relief of stay. Thereafter, the application was adjourned from time to time. Once the application for cancellation of bail was fully argued before a learned judge and, the order was reserved. However, the Judge recused himself. Thereafter, there were two more recusals.

5. On 2nd May 2024, the application for cancellation of bail was adjourned to 9th July 2024. On 3rd May 2024, the appellant applied to vacate the stay order. The application was listed on 22nd May 2024. The application for vacating stay could not be heard due to paucity of time. The learned Single Judge passed an order directing that the main application shall be heard on 9th July 2024 which was the date earlier fixed. The learned Judge, however, granted liberty to apply for interim bail.
6. Aggrieved by the first order granting stay passed on 23rd June 2023 and the second order dated 22nd May 2024 granting liberty to the appellant to apply for interim bail, these appeals have been preferred. This Court, by the order dated 7th June 2024, stayed the order of stay dated 23rd June 2023 and clarified that the appellant would be entitled to benefit of the order dated 17th June 2023 passed by the Special Court granting bail. Accordingly, the appellant has been enlarged on bail.

SUBMISSIONS

7. The learned counsel appearing for the appellant has taken us through various orders of the High Court. He pointed out that the application

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for cancellation of bail was listed on 24 to 25 dates from 23rd June 2023 to July 2024. One learned Single Judge, after reserving the judgment, recused himself. After that, two other learned Single Judges recused themselves. His submission is that the order granting bail was casually stayed by the High Court on 23rd June 2023 without examining the merits of the case and without recording any reasons. He submitted that if the benefit of the order granting bail is allowed to be taken away by such a cryptic order of interim stay passed without application of mind, it will violate the liberty guaranteed to the appellant under Article 21 of the Constitution of India.

8. Learned counsel appearing for the respondent has produced a compilation of documents. He stated that in several cases, even this Court had stayed the order granting bail while issuing notice on prayer for cancellation of bail without recording any reasons. Relying upon two decisions of this Court in the case of *Gulabrao Baburao Deokar v. State of Maharashtra*¹ and *Narendra Kumar Amin v. CBI*,² he submitted that the power to cancel the bail is not confined to the ground of breach of terms and conditions on which bail was granted. If the order granting bail is unjustified, illegal or perverse, an order of cancellation of bail can be passed. He also relied on this Court's decision in the case of *Puran v. Rambilas*.³ He submitted that when there is a power to set aside or cancel the order granting bail, there always exists a power to stay the order pending final adjudication of the prayer for cancellation of bail. He pointed out that the same learned Special Judge had rejected the regular bail application made by the appellant by the order dated 10th March 2023, and only after three months, on 17th June 2023, the same learned Judge granted bail though there was no change in circumstances. He submitted that in view of this position, the High Court was justified in granting the interim stay on 23rd June 2023.

CONSIDERATION OF SUBMISSIONS**GROUNDS FOR CANCELLATION OF BAIL**

9. Regarding the grounds available for cancellation of bail under Section 439(2), we can conveniently refer to a decision of this Court in the

1 [2013] 16 SCR 1181 : (2013) 16 SCC 190

2 (2015) 3 SCC 417

3 [2001] 3 SCR 432 : (2001) 6 SCC 338

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case of *Gulabrao Baburao Deokar*.¹ In paragraph 27 of the said decision, it was held thus:

“27. Thus, it could certainly be said that the order passed by the Sessions Judge was an order passed in breach of the mandatory requirement of the proviso to Section 439(1) CrPC. It is also an order ignoring the material on record, and therefore without any justification and perverse. As held by this Court in *Puran v. Rambilas* [(2001) 6 SCC 338: 2001 SCC (Cri) 1124], the High Court does have the power under Section 439(2) CrPC to set aside an unjustified, illegal or perverse order granting bail. This is an independent ground for cancellation as against ground of the accused misconducting himself.”

(emphasis added)

As held in the case of *Puran v. Rambilas*,³ apart from the ground that the accused has committed breaches of terms and conditions on which bail is granted, if he has otherwise misconducted himself, the High Court or Sessions Court can exercise power under Section 439(2) of CrPC to cancel the bail. Bail can be cancelled if the bail order is wholly unjustified, patently illegal, or perverse. Once it is held that there is a power vesting in the High Court or Sessions Court to cancel bail by exercising power under Section 439(2) of CrPC, it follows that the power to stay an order granting bail is implicit in the Court dealing with the applications. The question is about the contours of the exercise of power to grant a stay.

POWER TO GRANT INTERIM STAY OF ORDER GRANTING BAIL

10. When a person is arrested, the rights guaranteed by Article 21 of the Constitution of India get substantially curtailed. The law permits arrests of the accused as provided in the CrPC or the BNSS. The effect of the grant of bail under the provisions of Sections 437 and 439 of the CrPC (Sections 480 and 483 of the BNSS) is that the liberty of the undertrial accused is restored pending the trial, subject to the accused complying with the conditions of bail. When the High Court or Sessions Court stays such an order, it amounts to taking away the liberty granted under the order of bail. When an application for cancellation of bail is filed, the High Court or Sessions Court should be very slow in granting drastic interim relief of stay of the order

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granting bail. The reason is when a Court competent to grant bail finds the accused entitled to be enlarged on bail unless the said order is set aside on the limited grounds of cancellation available under sub-section (2) of Section 439 of CrPC or any other proceedings, the accused who has been granted bail cannot be normally deprived of his right to liberty guaranteed under Article 21 of the Constitution. Even if the order granting bail is not stayed, the accused can always be taken into custody if the bail is finally cancelled.

11. While issuing notice on an application for cancellation of bail, without passing a drastic order of stay, if the facts so warrant, the High Court can, by way of an interim order, impose additional bail conditions on the accused, which will ensure that the accused does not flee. However, an order granting a stay to the operation of the order granting bail during the pendency of the application for cancellation of bail should be passed in very rare cases. The reason is that when an undertrial is ordered to be released on bail, his liberty is restored, which cannot be easily taken away for the asking. The undertrial is not a convict. An interim relief can be granted in the aid of the final relief, which could be finally granted in proceedings. After cancellation of bail, the accused has to be taken into custody. Hence, it cannot be said that if the stay is not granted, the final order of cancellation of bail, if passed, cannot be implemented. If the accused is released on bail before the application for stay is heard, the application/proceedings filed for cancellation of bail do not become infructuous. The interim relief of the stay of the order granting bail is not necessarily in the aid of final relief.
12. The Court dealing with the application for cancellation of bail can always ensure that notice is served on the accused as soon as possible and that the application is heard expeditiously. An order granting bail can be stayed by the Court only in exceptional cases when a very strong *prima facie* case of the existence of the grounds for cancellation of bail is made out. The *prima facie* case must be of a very high standard. By way of illustration, we can point out a case where the bail is granted by a very cryptic order without recording any reasons or application of mind. One more illustration can be of a case where material is available on record to prove serious misuse of the liberty made by the accused by tampering with the evidence, such as threatening the prosecution witnesses. If the High Court or

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Sessions Court concludes that an exceptional case is made out for the grant of stay, the Court must record brief reasons and set out the grounds for coming to such a conclusion.

13. An *ex-parte* stay of the order granting bail, as a standard rule, should not be granted. The power to grant an *ex-parte* interim stay of an order granting bail has to be exercised in very rare and exceptional cases where the situation demands the passing of such an order. While considering the prayer for granting an *ex-parte* stay, the concerned Court must apply its mind and decide whether the case is very exceptional, warranting the exercise of drastic power to grant an *ex-parte* stay of the order granting bail. Liberty granted to an accused under the order granting bail cannot be lightly and causally interfered with by mechanically granting an *ex-parte* order of stay of the bail order. Moreover, the Court must record specific reasons why it concluded that it was a very rare and exceptional case where a very drastic order of *ex-parte* interim stay was warranted. Moreover, since the issue involved is of the accused's right to liberty guaranteed by Article 21 of the Constitution, if an *ex-parte* stay is granted, by issuing a short notice to the accused, the Court must immediately hear him on the continuation of the stay.

ON FACTS OF THE CASE

14. Now, we come to the facts of the case. The order dated 23rd June 2023 records the presence of the advocate representing the accused. Therefore, the High Court ought to have heard the Advocate before granting the stay. But that was not done. Thus, it was an *ex-parte* order of stay. The failure to hear the advocate for the accused and the failure to record reasons vitiates the order of stay. The application for cancellation of bail was placed before the High Court on 23rd June 2023. The order dated 23rd June 2023 indicates that without even applying mind to the merits of the prayer for a grant of stay, the *ex-parte* stay was granted, and the application was ordered to be listed at 2.30 pm on 26th June 2023. However, the case was not heard on that day. After 23rd June 2023, the case appeared on 28th June before another Single Judge. He directed that the case be listed before the roster bench on 3rd July 2023. The order of stay was extended. On 3rd July 2023, the case was adjourned to 14th July 2023. On 14th July 2023, 7th August 2023, and 17th August 2023, arguments were heard on the application for cancellation of bail. For one reason or

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another, further arguments could not be heard on 28th August 2023, 5th September 2023, 4th October 2023, 16th October 2023, 19th October 2023, and 3rd November 2023. Meanwhile, interim relief of stay of the order granting bail was continued from time to time.

15. The order of the High Court passed on 10th November 2023 records that the arguments were heard and judgment was reserved. After that, on 22nd December 2023, the application was listed for directions when the learned Judge, who had heard the arguments, passed an order directing that the application be listed before another Judge. From 8th January 2024 to 5th March 2024, the application was repeatedly adjourned without any hearing. On 5th March 2024, the case was again re-notified for 11th March 2024. On 11th March 2024, the learned Single Judge before whom the case was placed on eight earlier dates recused himself. On 12th March 2024, the case was shifted to another Single Judge who again passed an order of recusal. Incidentally, the same learned Judge had passed the *ex-parte* stay order on 23rd June 2023. After that, the case was adjourned on 18th March, 10th April and 2nd May 2024. On 2nd May 2024, the case was again adjourned to 9th July 2024. This compelled the appellant to apply to vacate the interim stay. The application for vacating stay was listed on 22nd May 2024, which was not heard due to paucity of time, and even the said application was adjourned to 9th July 2024, which was a date already fixed. The said order dated 22nd May 2024 does not make a happy reading. The order reads thus:

- "1. The matter could not be heard due to paucity of time.
2. List the matter on 09.07.2024 at 12:30 PM.
3. In case of any urgency in the matter or on any ground for which the petitioner wants to seek interim bail, it will be well within his right to do so and the same will be decided on merits as per law.
4. Interim order(s), if any, to continue, till the next date of hearing.
5. Copy of this order be given dasti under the signature Court Master.
6. The order be uploaded on the website forthwith."

The application moved before the Court was for vacating the stay.

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It is very difficult to understand the propriety of granting liberty to the appellant to apply for interim bail without even touching the application for vacating interim relief. The High Court ignored the extreme urgency of hearing the application for vacating the stay. The Court ignored that the drastic order of stay of bail order had continued for 11 months which was passed without considering the merits. The appellant got no solace by the direction of the High Court that a copy of the said order be given dasti and that the same shall be uploaded forthwith.

16. In this case, it is so apparent from the first impugned order dated 23rd June 2023 that the order granting bail was mechanically stayed without considering merits. The application was kept on 26th June 2023 at 2.30 pm. The High Court ought to have heard the parties on the prayer for interim relief on 26th June 2023 if the main application for cancellation of bail could not be heard. From 23rd June 2023 till the end of June 2024, the application for cancellation of bail was listed on 28 different dates. As noted earlier, there were three recusals. One recusal was made more than one month after the judgment was reserved. The result of all this is that the *ex-parte* order of stay granted on 23rd June 2023, without considering the merits of the case, continued to operate for one year. Thus, the order of stay granted without hearing the accused continued to operate for more than one year without hearing the accused on merits. Whether such an approach violated the fundamental right to liberty of the appellant is a serious question we must ask ourselves. Except for stating that this is a sorry state of affairs, we cannot say anything further as we must show restraint. Ultimately, in vacation, this Court granted a stay on 7th June 2024 to the order of stay, paving the way for the appellant's release on bail in terms of the order dated 17th June 2023, passed one year ago.
17. There may be good reasons for three learned Judges to have recused themselves. But surely, the *ex-parte* order staying the order of bail passed without considering merits cannot continue to operate for one year without the appellant getting a hearing on the issue of continuation of the interim order. All Courts have to be sensitive about the most important fundamental right conferred under our Constitution, which is the right to liberty under Article 21.
18. The first application for regular bail filed by the appellant was rejected by the Special Court by the order dated 10th March 2023. At that

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time, further investigation was in progress following filing the first complaint on 30th October 2021. The appellant was not named as an accused in the FIR of the predicate offence, ECIR, or in the first complaint under the PMLA. Within seven days after the first bail application was rejected, a second complaint was filed in which the appellant was shown as an accused for the first time. In view of the filing of the complaint, it was open for the appellant to file a second bail application based on a change in circumstances brought about by the supplementary complaint. The change was that the investigation against the appellant was completed.

19. We have carefully perused the order dated 17th June 2023 granting regular bail. After a detailed discussion, it records a finding that the appellant has made out a case in terms of Section 45(1)(ii) of the PMLA on the power to grant bail. We have perused the application made by the respondent before the High Court for cancellation of bail. We find no allegation of the misuse of liberty granted under the bail order in the said application. All the grounds are on merits. The order dated 17th June 2023 granting bail is a detailed order running into more than 50 pages, which considers the material on record from both complaints under the PMLA. After having perused the said order, we find that the case was not the one that could have been termed a rare and exceptional case where an order granting bail ought to be stayed.
20. Our conclusions are as under:
 - a. In an application made under Section 439(2) of the CrPC or Section 483(3) of the BNSS or other proceedings filed seeking cancellation of bail, the power to grant an interim stay of operation of order to bail can be exercised only in exceptional cases when a very strong *prima facie* case of the existence of the grounds for cancellation of bail is made out. While granting a stay of an order of grant of bail, the Court must record brief reasons for coming to a conclusion that the case was an exceptional one and a strong *prima facie* case is made out;
 - b. As a normal rule, the *ex-parte* stay of the bail order should not be granted. The said power can be exercised only in rare and very exceptional cases where the situation demands the passing of such drastic order. Where such a drastic *ex-parte* order of stay is passed, it is the duty of the Court to immediately hear

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the accused on the prayer for continuation of the interim relief. When the Court exercises the power of granting *ex-parte* ad interim stay of an order granting bail, the Court is duty bound to record reasons why it came to the conclusion that it was a very rare and exceptional case where a drastic order of *ex-parte* interim stay was warranted.

21. Therefore, the appeals must succeed. We set aside the impugned orders by which the High Court granted the stay of the order granting bail. We make it clear that pending the hearing of application for cancellation of bail, the order dated 17th June, 2023 passed by the Special Court will continue to operate. We make it clear that all the contentions on the merits of the application for cancellation of bail are expressly left open to be decided by the High Court. The findings recorded in the judgment are only for considering the legality and validity of the order of stay on the order granting bail.
22. The appeals are, accordingly, allowed on the above terms.

Result of the case: Appeals allowed.

[†]*Headnotes prepared by:* Ankit Gyan