

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF JULY, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL PETITION NO.4320/2022



BETWEEN

...PETITIONER

(BY SRI RAGHAVENDRA GOWDA K., ADVOCATE FOR
SRI MOHANKUMARA D, ADVOCATE)

AND

1 . STATE OF KARNATAKA
BY MAHADEVAURA POLICE STATION
REP BY STATE PUBLIC PROSECUTOR
HIGH COURT COMPLEX
BANGALORE-560001

2 . FAKIRAPPA HATTI
.....

... RESPONDENTS

(BY SRI H.S.SHANKAR, HCGP FOR R1;
SRI PRABHUGOUD B TUMBIGI, ADVOCATE FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439(2) OF CR.P.C PRAYING TO CANCEL THE ORDER DATED 04.04.2022 PASSED IN CRL.MIS.3084/2022 BY THE LIII ADDITIONAL CITY CIVIL AND SESSIONS SPECIAL JUDGE, BENGALURU IN FAVOUR OF THE RESPONDENT NO.2 FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 323, 376, 420, 506 OF IPC AND ETC.

THIS CRIMINAL PETITION COMING ON FOR ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This petition is filed under Section 439(2) of Cr.P.C., seeking cancellation of the order dated 04.04.2022 passed in Crl.Mis.3084/2022 by the LIII Additional City Civil and Sessions Special Judge, Bengaluru in favour of the respondent No.2 for the offences punishable under Sections 323, 376, 420, 506 of IPC.

2. Heard the learned counsel appearing for the petitioner, the learned High Court Government Pleader appearing for the first respondent-State and the learned counsel appearing for the second respondent.

3. The factual matrix of the case is that the complainant/victim had filed the private complaint before the

Court making allegation against respondent No.2 that he being a Police Constable, promised the victim that he would marry her and on that guise, he subjected her for sexual act continuously from 2019 till the date of giving the complaint i.e., in the month of February 2022 but, he has not married the complainant. Firstly, on 14.02.2022, the complainant had approached the Police Inspector, Mahadevapura Police Station where respondent No.2 was working alleging cheating and subjecting her for sexual act under the guise of marrying her, from 2019, but, the said complaint was not registered and hence, on 23.02.2022, the complainant had approached the Police Commissioner, Infantry Road, Bengaluru, wherein also she reiterated the aforesaid allegations against respondent No.2, but the said officer has also not taken any action against the said complaint and again on 24.02.2022, the complainant gave one more complaint before the Deputy Commissioner of Police, Infantry Road, Bengaluru and on the said complaint also, no action was taken, hence, without any other alternative, the complainant had approached the jurisdictional Court and the learned Magistrate referred the matter for investigation under Section 156(3) Cr.P.C. Thereafter, respondent No.2 had approached the Sessions Court

by filing a petition under Section 438 of Cr.P.C., and the Trial Court vide order dated 04.04.2022 granted anticipatory bail in coming to the conclusion that the complainant is aged about 27 years and had physical relationship with respondent No.2 for all these three years which amounts to consensual relationship. The respondent No.2 had also lodged the complaint against the complainant in Cr.No.67/2022 in the very same police Station, wherein he was earlier working and the contents of the complaint as narrated in the order indicates that he had paid an amount of Rs.3 lakhs and also was paying rent of Rs.7,000/- per month to the complainant and maintaining her expenses and had further alleged that she is demanding an amount of Rs.10 lakhs from respondent No.2 or otherwise, she will file a false complaint against him. In this regard, settlement was arrived through an advocate to pay a sum of Rs.3,50,000/- and respondent No.2 has paid Rs.1,00,000/- through google pay to the bank account of her advocate. By assigning the aforesaid reasons and by exercising the powers under Section 438 of Cr.P.C., the Sessions Court has granted anticipatory bail in favour of respondent No.2 herein. Hence, the present petition is filed by the complainant to cancel the bail granted in favour of respondent No.2.

4. The main ground urged by the complainant before this Court is that respondent No.2 is an influential person and he is working as Police Constable and that the complaints are given on 14.02.2022, 23.02.2022, 24.02.2022, 22.04.2022, 30.04.2022 to take action against respondent No.2, but, none of the police officers from the Inspector level to the Commissioner of Police level have taken any action based on the said complaints. Hence, without any other alternative, the complainant had approached the jurisdictional Magistrate. The counsel also vehemently contend that while granting anticipatory bail, first of all, the Court has not discussed the factual aspects of the case, instead, referred the contents of the complaint given by respondent No.2 and in an heinous offence under Section 376 of IPC, without discussing the merits of the case, granted bail in favour of respondent No.2, hence, the order of the Trial Court is perverse, capricious and requires interference of this Court. The counsel also brought to notice of this Court to paragraph 9 of the said order wherein it is seen that the first condition that was imposed to the accused is that he shall not tamper the prosecution witnesses. But, he has violated the said condition

and had threatened the prosecution witnesses to shift the house and also threatened her with dire consequences of life, if she won't withdraw the complaint. The counsel also brought to notice of this Court that while exercising the discretion, the Sessions Judge imposed the second condition that the accused shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him in disclosing such facts to the Court or to any of the police officer. Accused / respondent No.2, being a Police Constable and also working in the very same police station where the FIR was registered had indulged in threatening the complainant and compelling her to withdraw the case and as such, sought for cancellation of bail.

5. The learned counsel appearing for the respondent No.2 would submit that the very allegation made in the complaint is baseless and the Sessions Judge while exercising the discretion under Section 438 of Cr.P.C., rightly taken note of the factual aspects that she is a married women and having children and apart from that the complainant having an habit of blackmailing respondent No.2 and having taken money

periodically from him. Hence, the order passed by the Trial Court is not perverse, capricious as contended by the counsel for the petitioner. The counsel vehemently contend that the cancellation of bail cannot be exercised in a mechanical process and with regard to the threat is concerned, submits that though the complaint is given subsequent to the grant of bail without stating any particular date that as and when the threat is caused and the very contention that the respondent No.2 compelled the complainant to withdraw the case to support the case of the prosecution, cannot be accepted. The counsel in support of his argument relied upon the judgment dated 17.05.2018 of the Apex Court and also referred to paragraph 5 with regard to the facts of the case and also referred to point No.7 in paragraph 6 with regard to the accused promising to marry her was a matter of trial and whether her consent was obtained by fraud could only be established during the course of the trial, and also referred the earlier judgments in paragraphs 11 and 12 wherein also taken note of being making false promise to marry her and traveling along with accused and the Apex Court has come to the conclusion that High Court while allowing the application for bail cannot be faulted, moreover, no supervening circumstances has

been made out to warrant the cancellation of bail, hence, dismissed the Special Leave Petition. The counsel referring to this judgment would vehemently contend that the factual aspects of the case are aptly applicable to the case on hand and hence, the petitioner/complainant is not entitled for relief under Section 439(2) of Cr.P.C.

6. Per contra, the learned High Court Government Pleader appearing for the State would submit that the complainant has given the complaint enclosing the photographs and inspite of that, notice was given and has not replied to the notice and not co-operating with the investigation.

7. Having heard the learned counsel appearing for the petitioner, the learned counsel appearing for the respondent No.2 and learned High Court Government Pleader for the respondent-State and also considering the material available on record, the point that would arise for consideration of this Court is that:

- (1) Whether the petitioner/complainant has made out the ground to cancel the bail

granted by the Sessions Court vide order dated 04.04.2022?

(2) What order?

Point No.1:

8. Having heard the respective counsel appearing for the parties and also on perusal of the material available on record it discloses that the petitioner/complainant had approached the police on 14.02.2022, 23.02.2022 and 24.02.2022 seeking an action against respondent No.2, who happened to be the Police Constable but, no action was taken either by the Police Inspector or the Commissioner of Police or Deputy Commissioner of Police hence, without any other alternative, the complainant has filed the private complaint in PCR No.51495/2022 before the IV Additional Chief Metropolitan Magistrate, Bengaluru and the matter was referred to the investigation under Section 156(3) Cr.P.C., and based on the reference, the case was registered and immediately, the respondent No.2 had approached the Sessions Court seeking the anticipatory bail.

9. The Court can exercise the powers under Section 439(2) of Cr.P.C. under two circumstances, one is with regard to the violation of the conditions imposed by the Court and the second one is, when the Trial Court has passed any perverse and capricious order. It is a settled law that the Court cannot exercise the discretion mechanically while exercising the powers under Section 439(2) of Cr.P.C., but has to consider supervening circumstances and also keep the principles laid down in the judgment referred by counsel appearing for respondent No.2 which is referred supra and also the judgment of the Apex Court reported in **(2016) 15 SCC 422** in the case of **NEERU YADAV vs STATE OF UTTAR PRADESH AND ANOTHER** wherein the Apex Court held that the factors to be considered while granting bail are (i) nature of accusation and severity of punishment in cases of conviction and nature of supporting evidence; (inflicted injury) reasonable apprehension of tampering with witnesses for apprehension of threat to complainant; and (iii) prima facie satisfaction of court in support of charge and all these facts to be considered while exercising the powers under Section 439 and also in the very same judgment, the Apex Court held that differences between cancellation of bail order and quashment of

bail order and grounds of illegality, etc., where cancellation of bail order was sought because of supervening circumstances, but was a case where legality of order of High Court granting bail on grounds of parity was challenged because High Court had failed to take into consideration criminal antecedents of accused and apart from that Apex Court also discussed with regard while exercising the discretion under Section 439(2) of Cr.P.C.

10. The Apex Court in the recent judgment reported in **AIR 2020 SC 670** in the case of **MAHIPAL vs RAJESH KUMAR ALIAS POLIA AND ANOTHER** with regard to the cancellation of bail is concerned has held that failure of High Court to notice material facts showing non-application of mind to the seriousness of crime and cancel the bail and also considered the scope of Section 439 of Cr.P.C. in granting the bail and also denial of bail without assigning any reason leads to presumption of non-application of mind. Hence, the Apex Court held that if the Trial Court failed to apply its mind with regard to the exercising of discretion, the High Court can invoke Section 439(2) of Cr.P.C. The Apex Court also in the recent judgment in **(2021) 6 SCC 230** in the case of **RAMESH BHAVAN RATHOD**

vs VISHANBHAI HIRABHAI MAKWANA (KOLI) AND ANOTHER held with regard to the exercising of powers under Section 439 of Cr.P.C. and while canceling the bail held that the Court has to take note of the seriousness and gravity of offences committed and severity of punishment in the event of conviction, failure of High Court to consider while granting bail, absence of reasons, order granting bail in present case, held, perverse and hence, while setting aside the order made an observation that it is clearly a case where orders passed by High court suffer from clear perversity, first circumstances which should have weighed with High court, but which was glossed over, is seriousness and gravity of offences and also categorically held that if the facts of the case is not considered in its entirety, at least, in brief and balance the discretion and if the Judge passes an order without application of mind judiciously and failed to make thought process while passing an order in granting bail and the same amounts to non-application of mind. It is further held that mandatory duty of Court to record (at least brief) reasons while granting bail under Section 439 of Cr.P.C. is a matter involving exercise of judicial discretion. Judicial discretion in granting or refusing bail, as in case of any other discretion which is vested in

court as judicial institution, is not unstructured. Duty to record reasons is significant safeguard which ensures that discretion which is entrusted to court is exercised in judicious manner, recording of reasons in judicial order ensures that thought process underlying order is subject to scrutiny and that it meets objective standards of reason and justice and observed that the bail order which does not contain reasons for prima facie concluding that bail should be granted is liable to be set aside for non-application of mind. Keeping in mind the principles laid down in the aforesaid judgment, this Court has to examine whether the Trial Court while exercising the powers under Section 438 of Cr.P.C., had applied its mind and has considered the factual aspects of the case at least in brief or not.

11. Having perused the order passed by the Trial Court, the reasons assigned by the Trial Court is that the complainant is aged 27 years, had physical relationship with accused for all three years, which amounts to consensual relationship and this opinion is formed at the stage of considering the bail petition that too a petition under Section 438 of Cr.P.C., without discussing about the contents of the complaint of the petitioner

and had instead made the reference of filing the complaint by respondent No.2 wherein he has alleged the relationship between them, regarding payment made and also regarding accommodation made to the complainant by paying the rent of Rs.7,000/- per month and nothing is discussed with regard to the factual aspects of the case, particularly, the allegations made in the complaint of the petitioner. When such being the case, the order passed by the Trial Court without looking into the allegations made in the complaint and without assigning any reasons, answered point No.1 in affirmative by granting bail, that too when a serious offence of Section 376 IPC is invoked against respondent No.2, who happens to be a Police Constable. In the absence of any discussion in the order about the allegations made in the complaint, the Court has formed an opinion that it amounts to a consensual relationship since she is having physical relationship with respondent No.2 and the same cannot be a ground even if the complainant is having a bad character and that she is vulnerable to, subject her for sexual act and apart from that the very contents of the complaint which have been referred by the Sessions Judge clearly discloses that respondent No.2 himself narrated in the complaint for having

paid the amount of Rs.3 lakh as well as made separate arrangements such as paying rent of Rs.7,000/- to the complainant, hence, the perverse order has been passed by the Trial Court without looking into the contents of the complaint and not discussed anything about the factual aspects of the case. Hence, it is capricious and perverse order, which requires interference of this Court exercising the powers under Section 439(2) of Cr.P.C.

12. Apart from that, the complainant had approached Police Inspector, wherein respondent No.2 was working earlier, by filing a complaint alleging that the respondent No.2 has committed sexual act continuously promising that he would marry her. But, the Police Inspector did not entertain the said complaint hence, the same is against the principles laid down by the Apex Court in the case of **LALITA KUMARI VS. GOVERNMENT OF UTTAR PRADESH AND OTHERS** reported in **(2014) 2 SCC 1**. It is also unfortunate that when the complaint was given before the Police Inspector on 14.02.2022, no action was taken, hence, the petitioner was compelled to approach the Police Commissioner on 23.02.2022 and no action

was taken even by the Police Commissioner. Hence, one more complaint was given on 24.02.2022 before the Deputy Commissioner of Police and no action was taken by him also and when no action was taken by the respective police officers, without any other alternative, the complainant/victim had approached the jurisdictional Magistrate by filing a Private Complaint under Section 200 of Cr.P.C., and the learned Magistrate referred the matter under Section 156(3) of Cr.P.C., for investigation. When cognizable offence is alleged, it is the foremost duty of the Investigating Officer to receive the complaint and register the case even if there is no jurisdiction also and thereafter, send the complaint to the jurisdictional police. The same has not been done by the police and when the matter was taken before the Sessions Court, even the Sessions Court also not applied its mind to the alleged cognizable offence and passed an order on flimsy ground alleging that it amounts to a consensual relationship, which is unfortunate, Hence, the complainant has invoked Section 439(2) of Cr.P.C., before this Court.

13. Having considered the factual aspects of the case, it is seen that the trial Court has not considered and discussed about the contents of the complaints of the complainant as well as respondent No.2 and proceeded to pass order in a mechanical process. Even though the counsel for respondent No.2 has brought to the notice of this Court the judgment of the Apex Court of the year 2018, this Court has relied upon the recent judgment of the Apex Court of the year 2021 with regard to the exercising the powers under Section 439(2) of Cr.P.C. No doubt the Trial Court has passed the order in a mechanical manner without considering whether any supervening circumstances have been rendered or not and has taken note that it is no longer a fair trial and allowed accused to retain his freedom by enjoying the concession of bail during the trial. But, in the case on hand, there is a glaring error on the part of the Sessions Judge that while exercising the powers under Section 438 of Cr.P.C., passed a perverse and capricious order without looking into the contents of the complaint of the petitioner and instead of discussed the contents of the complaint given by the respondent No.2, which led to miscarriage of justice.

14. In view of the discussions made above, I pass the following:

ORDER

The petition is allowed. The impugned order dated 04.04.2022 passed in CrI.Misc.No.3084/2022 by LIII Additional City Civil and Sessions Special Judge, Bengaluru is hereby set aside and directed to take respondent No.2 to the custody forthwith.

**Sd/-
JUDGE**

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