

Before Vikas Bahl, J.

G.HEMAVATHY—Petitioner

versus

STATE OF HARYANA —Respondent

CRR No.764 of 2021

August 26, 2021

Code of Criminal procedure, 1973 – S.439 (2) Narcotic Drugs and Psychotropic Substances Act, 1985 – S.21 (c) – Mere non-disclosure of Factum of pendency of Bail Application before High Court while moving Bail Application before Sessions Court not ground to cancel the bail.

Held that, the Hon'ble Supreme Court in the case of Mohan Singh (supra) had specifically held that merely on account of the fact that an accused has simultaneously moved for bail in the Sessions Court as well as in the High Court without disclosing to the Sessions Court that he had moved for bail in the High Court, would not be a ground to cancel the bail which has already been granted. The case of the petitioner is covered on all fours by the said judgment. Even the said judgment was referred in para 7 of the detailed reply (Annexure P-2) to the application (Annexure P-1) under Section 439 (2) Cr.P.C. However, in the impugned order the said judgment has not been considered.

(Para 10)

Aditya Sanghi, Advocate
for the petitioner.

Praveen Bhadu, AAG, Haryana. (Through Video Conferencing)

VIKAS BAHL, J. oral

(1) This is a revision petition challenging the order dated 16.07.2021 *vide* which the learned Sessions Judge, Sirsa, was pleased to cancel the regular bail granted to the petitioner which was granted *vide* order dated 28.06.2021 in an application filed under Section 439 (2) Cr.P.C. in FIR No.37 dated 21.03.2021 under Section 21 (c) of the NDPS Act, 1985, registered at Police Station Ding, District Sirsa, Haryana, primarily on the ground that the daughter of the Petitioner in the Affidavit accompanying the regular bail application before the

Sessions Court had not mentioned about the Petition for regular bail which was filed before this Court and was pending.

(2) Learned counsel for the petitioner has vehemently argued that in the present case, the learned Sessions Judge, Sirsa, had *vide* order dated 28.06.2021 (Annexure P-3) granted bail to the petitioner, who is a 63 year old lady. Reference has been made to the said order in which the learned Sessions Judge, Sirsa, has taken note of the fact that no recovery had been effected from the petitioner and that there was no incriminating evidence against the present petitioner except the disclosure statement of the co-accused Harminder Singh and Natha Singh, from whom the alleged recovery was made. It was further noticed that the petitioner had been in custody since 22.03.2021.

(3) Learned counsel for the petitioner has relied upon the judgment passed in CRM-M-12051-2020, by a Co-ordinate Bench of this Court dated 17.06.2021 titled as "***Mewa Singh Vs. State of Punjab***" and the judgment passed in ***CRM-M-12997-2020 titled as "Daljit Singh Vs. State of Haryana"***, to contend that merely on the basis of the disclosure statement of the co-accused the petitioner should not be denied the concession of bail. The relevant portion of ***Mewa Singh's*** judgment is reproduced hereinbelow:-

"1. The petitioner has approached this Court seeking grant of anticipatory bail in a case registered against him vide FIR No.133 dated 24.11.2019 under Section 21 NDPS Act Police Station Lohian, District Jalandhar.

2. Reply way of affidavit of Mr. Piara Singh, PPS, Deputy Superintendent of Police, Sub-Division Shahkot, District Jalandhar (Rural) on behalf of the respondent-State has been filed, which is taken on record.

3. The allegations in nut-shell are that Bachittar Singh was found in possession of 1.7 Kgs. 'Heroin'. During the course of interrogation, he made a disclosure statement nominating the petitioner as an accused wherein he stated that the contraband in question had been supplied by the petitioner.

4. Learned counsel for the petitioner has submitted that he has falsely been implicated in the present case and was never arrested at the spot and that the alleged disclosure statement is not worth credence.

5. Opposing the petition, learned State counsel has submitted that keeping in view the antecedents of the petitioner his complicity is clearly evident inasmuch as he stands involved in three other cases i.e. FIR No.43 dated 2.4.2016 under Sections 15, 21, 22 NDPS Act, Police Station Sultanpur Lodhi; FIR No.5 dated 5.1.2020 under Sections 307, 186, 332, 353, 224, 225, 427, 148, 149 IPC, Police Station Sultanpur Lodhi & FIR No.193 dated 193 dated 22.11.2019 under Sections 15, 21, 25, 29 NDPS Act, Police Station Kartarpur.

6. I have considered rival submissions addressed before this Court.

7. It is not disputed that the petitioner was never apprehended at the spot and that the only evidence against him is in the shape of disclosure statement, the admissibility and veracity of which would be tested during the course of trial. As regards the other three cases which are stated to be pending against the petitioner, the learned counsel for the petitioner has submitted that even in the said cases he has been falsely implicated and was never arrested at the spot and has been granted anticipatory bail in all three cases.

8. Having regard to the facts and circumstances of the case and that it is a case where the petitioner has been nominated solely on the basis of disclosure statement, the petition is accepted and it is ordered that the petitioner in the event of his arrest shall be released on bail subject to his furnishing personal bonds and surety bonds to the satisfaction of Arresting/Investigating Officer. However, the petitioner shall join the investigation as and when called upon to do so and cooperate with the Arresting/Investigating Officer and shall also abide by the conditions as provided under Section 438 (2) Cr.P.C.

9. It is however clarified that in case the petitioner does not join investigation, it shall be open to the investigating agency/prosecution to move for cancellation of his bail.”

(4) The relevant portion of *Daljit Singh's* (supra) judgment is reproduced hereinbelow:-

“Petitioner seeks grant of anticipatory bail under Section

438 Cr.P.C. in case bearing FIR No.188 dated 08.04.2020 registered under Sections 15, 18, 27A, 29 of NDPS Act, under Sections 140, 188, 216, 419, 420, 467, 468, 471, 474 IPC and under Section 6 of Official Secret Act at Police Station Pehowa, District Kurukshetra. Petitioner has been implicated on the basis of disclosure statement of co-accused from whom 248 kgs of poppy husk, 1 Kg 500 grams of opium and 199 Kgs khas khas were recovered.

FIR was registered on the basis of secret information, but still name of petitioner did not figure in the ruqa of the police.

Notice of motion was issued on 27.05.2020 alongwith interim directions in favour of the petitioner to join the investigation.

Order dated 27.05.2020 is reproduced here as under:-

“On account of outbreak of covid-19 the instant matter is being taken up through video conferencing.

Instant petition has been filed under Section 438 Cr.PC for grant of anticipatory bail to the petitioner in FIR No.188 dated 8.4.2020 for the offences under Section 15,18,27-A,29 of NDPS Act, 1985 at Police Station Pehowa, District Kurukshetra.

Learned counsel for the petitioner has inter alia contended that the petitioner is innocent and has been falsely implicated in the case only on the basis of disclosure statement of co-accused from whom recovery of 248 kgs of poppy husk, 1 kg 500 grams of opium and 199 kgs.of khas khas was recovered. It has been further contended that the factum of his false implication is further fortified from the fact that the recovery of the aforementioned narcotic contraband was effected on the basis of secret information and his name did not figure either in the ruka sent by the police nor in the FIR in question coupled with the fact that nothing was recovered from him. He is not even involved in any other case of similar nature.

Notice of motion for 10.7.2020.

On the asking of the Court, Mr. Saurabh Mohunta, DAG., Haryana accepts notice.

Meanwhile, petitioner is directed to join the investigation and appear before the investigating agency/Investigating Officer. On his appearance, he shall be released on interim bail to the satisfaction of arresting/investigating officer. The petitioner shall, join the investigation as and when call for and shall abide by the conditions specified under Section 438(2) Cr.P.C. **27.05.2020**

Thereafter, the case was adjourned for filing detailed reply on behalf of the State.

The stands of the State is that the petitioner was escorting the canter in which the contraband was present and he was assigned the duty of giving signal in case of presence of police on the way.

Learned State counsel relies upon call details, tower location of the petitioner and the co-accused and also relies upon bank statement showing deposit of amount in the account of coaccused. The material on which the learned State counsel relies upon is dependent upon the evidence to be led in that context at the relevant stage.

Petitioner has joined the investigation, but learned State counsel seeks custody of the petitioner on the aforesaid premise.

Having heard learned counsel for the parties, I find that the petitioner having involved on the basis of disclosure statement of co-accused namely Balbir and Rajinder is hit by the ratio of *Tofan Singh* versus *State of Tamil Nadu, Criminal Appeal No.152 of 2013* wherein it has been observed that the officers who are invested with powers under Section 53 of NDPS Act are the police officers within the meaning of Section 25 of the Evidence Act. Any confessional statement made before the police officer would be hit by Section 25 of the Evidence Act. Statement under Section 67 of NDPS Act cannot be used as a confessional statement in the trial of an offence under NDPS Act.

In view of aforesaid position, it would be just and appropriate to confirm order dated 27.05.2020, without meaning anything on the merits of the case.

Ordered accordingly.

However, the petitioner shall keep on joining the investigation as and when required to do so by the Investigating Officer and shall abide by the conditions as envisaged under Section 438(2) Cr.P.C.

Petition stands disposed of.”

(5) Learned counsel for the petitioner has further pointed out that although the petitioner had not been released on bail, but the Station House Officer had filed an application for cancellation of bail under Section 439 (2) Cr.P.C., primarily on the ground that in the affidavit of the daughter of the petitioner, which was accompanying the regular bail application filed by the petitioner, it has been stated “that the present bail application is the second bail application under Section 439 Cr.P.C. and the first application was already dismissed by this Hon'ble Court”, however, there was no mention with respect to the **CRM-M-19144-2021** which was filed in this Court seeking regular bail for the petitioner and was pending. It is submitted that a detailed reply was filed to the said application in which several legal points were raised. It was firstly stated that the petitioner had not been released on bail and she was in custody of the Court and, thus, the question of filing application for cancellation of bail under Section 439 (2) Cr.P.C., would not arise. Reference has also been made to the said provision, which is reproduced hereinbelow:-

“439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

XXX---XXX---XXX

(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.”

(6) It has been submitted that a perusal of the above provision would show that it would apply only in a case where a person who has been released on bail under this Chapter is to be arrested and put in custody. Since in the present case, the petitioner was never released on bail and was in the custody of the Court, thus, the question of arresting the petitioner and committing her to custody did not arise. Further reference was made to paragraph 7 of the said application in which reliance has been placed upon the judgment of the Apex Court in Criminal Appeal no. 118 of 1978, titled as *Mohan Singh* versus *U.T.*,

Chandigarh, decided on 20.2.1978, in which it was observed that merely because the factum of a bail application pending before the High Court was not disclosed, the same would not call for cancellation of the bail granted. The relevant portion of the said judgment is reproduced hereinbelow:-

“The offence alleged in this case against the appellant is one under Section 5(2) of the Prevention of Corruption Act. Bail was granted by the Sessions Judge after hearing counsel on both sides but it was cancelled by the High Court mainly for the reason that the appellant had simultaneously moved for bail in the Sessions as well as in the High Court without disclosing to the Sessions Court that he had moved for bail in the High Court. This naturally made the High Court feel that the party was not straight-forward in his dealings, with the Court. The consequence was that the bail already granted was reversed.

Counsel for the State pressed before us that the corruption of which the appellant was guilty prima-facie (according to the results of the investigation) was substantial. Let us assume so. Even then refusal of bail is not an indirect process of punishing an accused person before he is convicted. This is a confusion regarding the rationale, of bail. This Court has explained the real basis of bail law in *Gurcharan Singh & ors. etc. v. State (Delhi Administration)* (1). We do not think there is as yet any allegation against the appellant of interference with the course of justice or other well-established grounds for refusal of bail. In this view, we direct that the appellant be allowed to continue on bail until further orders to the contrary passed by the Sessions Court if good grounds are made out to its satisfaction.

Appeal allowed.”

(7) It was also submitted that the error, if any, was *bona fide* and was not intentional and there were no allegations against the petitioner or her daughter that they were interfering in the investigation or there were any chances of the petitioner pressurizing the witnesses. Reliance in the application was also made to a Division Bench of the Calcutta High Court to the effect that cancellation of bail stands on a much stricter footing and has to be resorted to only in exceptional cases. It is also argued by the learned counsel for the petitioner that it

was not the petitioner who had made any misstatement as she herself was in custody. The daughter of the petitioner had also not made a false statement but had due to an inadvertent mistake, only mentioned about the first bail application and did not mention about the criminal miscellaneous petition pending in the High Court, as she not being a legal expert was not aware about the intricacies of law. It is submitted that there was no column stating that a petition which has been filed in the High Court was also required to be disclosed. It is further submitted that as per the stand in the reply, it has been stated that the petitioner was undergoing mental trauma, as the petitioner who is mother of the deponent and who had never been involved in any case, had been falsely implicated in the present case. It has been submitted that the learned Sessions Judge, Sirsa, has without taking into consideration the said aspects of the matter and the legal position, cancelled the bail granted *vide* order dated 28.06.2021. It is further submitted that in the present case, even as per the detailed affidavit filed by the respondent-State, it is apparent that the challan has already been filed on 16.06.2021 and the investigation in the case is complete. Reference has also been made to para 6 of the affidavit of Sh. Sanjay Kumar, Deputy Superintendent of Police, Sirsa, wherein in paragraph 6, it has been stated that the petitioner is not involved in any other case. It is also submitted that the petitioner is an old lady of 63 years of age, has several old age problems and has been in custody since 22.03.2021 and has suffered enough for the inadvertent mistake made by her daughter. Learned counsel for the petitioner has further submitted that in fact it was the petitioner through her counsel, who had brought to the notice of this Court the factum of the bail having been granted by the Sessions Court. Further reference has been made to the order passed by the Co-ordinate Bench when the notice of motion was issued on 30.07.2021 in the present petition. The said order is reproduced as under:-

“Case taken up through video conferencing.

Learned counsel for the petitioner has pressed into service judgment titled as '*Mohan Singh* versus *Union Territory, Chandigarh*' in Criminal Appeal No.118 of 1978, decided on 20.02.1978 by the Apex Court in support of his contention that the concession of regular bail granted to the petitioner has wrongly been withdrawn by learned Sessions Judge, Sirsa for the reason that she had concealed the factum of petition for regular bail filed by her before this Court being pending, when the petition craving for grant of

similar relief was filed before learned Sessions Judge, which was allowed. Learned counsel has further contended that petitioner has not yet come out of the custody, since, she had not furnished the requisite bonds.

Notice of motion.

Mr. Gaurav Bansal, AAG, Haryana, accepts notice on behalf of the respondent-State. On the adjourned date, the State counsel shall file detailed reply to the petition.

List on 16.08.2021.”

(8) On the other hand, learned State counsel has referred to the reply which has been filed by the State and has submitted that although there is no recovery of narcotic drug from the petitioner but after the arrest of the petitioner on 23.03.2021, an amount of Rs.1,06,000/- has been recovered from her. It has been stated that the daughter of the petitioner should have also mentioned in the affidavit about the criminal miscellaneous petition which was pending in this Court, in which the prayer was for grant of regular bail as she was the one who was taking care of the case. It has further been stated that now the case is fixed for framing of charges for 02.09.2021.

(9) This Court has heard learned counsel for the parties and is of the opinion that the present revision petition deserves to be allowed and the impugned order deserves to be set aside.

(10) The Hon'ble Supreme Court in the case of Mohan Singh (supra) had specifically held that merely on account of the fact that an accused has simultaneously moved for bail in the Sessions Court as well as in the High Court without disclosing to the Sessions Court that he had moved for bail in the High Court, would not be a ground to cancel the bail which has already been granted. The case of the petitioner is covered on all fours by the said judgment. Even the said judgment was referred in para 7 of the detailed reply (Annexure P-2) to the application (Annexure P-1) under Section 439 (2) Cr.P.C. However, in the impugned order the said judgment has not been considered.

(11) Moreover, it is not in dispute that when the application for cancellation of bail was filed under Section 439 (2) Cr.P.C. for cancelling the bail granted *vide* order dated 28.06.2021, the petitioner who is an old lady of 63 years, was in custody of the Court. A bare reading of the provision under Section 439 (2) Cr.P.C. would show that

the cancellation could be sought in a situation where the person has been released on bail and is sought to be arrested and committed to custody. Thus, the application on the basis of which the order is passed was legally not maintainable. Moreover, specific objection with respect to the same was taken in paragraph 3 of the detailed reply filed to the said application, however, the learned Sessions Judge, Sirsa, in the impugned order, has not considered the said important aspect. Thus, on the said two aspects alone, the impugned order deserves to be set aside. It would however, be relevant to note that the present petitioner, who is an old lady of 63 years, even as per the affidavit filed by the State, is not involved in any other case. The petitioner has been in custody since 22.03.2021, *challan* has already been filed and now the case is fixed for framing of charge on 02.09.2021 and, thus, the trial is likely to take time. The petitioner has suffered further incarceration for two months for the mistake made by her daughter and cannot be kept in custody for all times, moreso, when the learned Sessions Judge *vide* his earlier order dated 28.06.2021 had found the petitioner entitled to bail.

(12) Keeping in view the above said facts and circumstances, the present revision petition is allowed and the impugned order dated 16.07.2021 is set aside.

(13) Needless to mention that the earlier order dated 28.06.2021 would, thus, be in operation.

(14) Since the main revision petition has been decided, pending miscellaneous application(s), if any, shall stand disposed of.

Sumati Jund