

## CHAPTER-EIGHT

# CANCELLATION OF BAIL

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### I Introduction

BAIL JURISPRUDENCE in India (as in other common law countries) has evolved laying emphasis on the right to liberty of the accused as opposed to the requirement of the State to keep him/her under custody. The Supreme Court in *Vaman Narain Ghiya v. State of Rajasthan*,<sup>1</sup> highlighted that the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and a presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.

In India, criminal law practice indicates that there may be numerous situations wherein the mechanism of bail can be refused or not be made available if found to be in conflict with justice and fair investigation. Such situations of conflict may be evident while an application of bail is being considered, or may also arise after an order of bail has been granted by the court. In the latter case, the courts may exercise their discretion<sup>2</sup> to cancel the order of bail, which had been passed earlier.<sup>3</sup> The mechanism for cancellation of bail is provided in law in order to ensure that justice will be done to the society by preventing the accused who had been set at liberty by the bail order from tampering with the evidence in a heinous crime.<sup>4</sup> At the same time, cancellation of bail takes away the liberty granted by the Constitution and affirmed by an order of the Court, which granted bail. Taking note of the fact that cancellation of bail necessarily involves the review of a decision already made, it has been emphasised that the same should always be exercised very sparingly by the court of law.<sup>5</sup>

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1 AIR 2009 SC 1362.

2 Chapter four of this book exclusively deals with “Judicial Discretion”.

3 In *Dhanpal v. State of Uttar Pradesh*, 1997 (21) ACR 987 it was held that in the case of cancellation of the bail, right of the accused to file a fresh application for bail does not cease. The accused is not disentitled to lodge an application for bail;

4 *Panchanan Mishra v. Digambar Mishra* (2005) 3 SCC 143.

5 *CBI v. Vijay Sai Reddy* (2013) 7 SCC 452 at 465

## II Power to cancel bail

Under the Code, the discretion to cancel bail can be exercised at the instance of either the accused, public prosecutor, the complainant or any other aggrieved party.<sup>6</sup> The power to cancel bail already granted is vested in the high court, court of session as well as to other subordinate Courts including Magistrates. However, Courts other than the high court and court of session can only cancel bail granted by them. The high court and court of session have broader powers of cancellation and they can also cancel bail granted by the subordinate courts. The power of the subordinate courts including Magistrates to cancel a bail comes from section 437 (5) of the Code<sup>7</sup> while the high court and the court of session derive their power from section 439 (2) of the Code<sup>8</sup>. The jurisdiction of the court of session and that of the high

6 See, *R Rathinam v. State of DSP* (2000) 2 SCC 391; *Puran v. Rambilas* (2001) 6 SCC 368; *State v. Niwas Sharma*, 2012 (1) Crimes 562. Also see *Jetha Bhaya v. Ganga Maldebhai*, AIR 2012 SC 775; *Maninder Kaur v. Teja Singh*, 2000 (3) ACR 2611 (SC).

7 The relevant provisions of the s. 437 are as follows:

1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but-

(2) If it appears to such officer or court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

5) Any court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to Custody

8 Section 439 of the Code reads as follows:

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

(a) That any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition, which it considers necessary for the purposes mentioned in that sub-section;

(b) That any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(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

court under section 439 (2) of the Code is concurrent. It is open to the aggrieved party to file an application for cancellation of bail granted by the magistrate either before the court of session or the high court. It would not be a violation of judicial propriety if such a petition is filed before the high court bypassing the court of session.<sup>9</sup>

The consideration of hierarchy of the courts and exercise of power in the context of considering bail applications came under judicial scrutiny in one of the first cases on this issue passed after the coming into effect of the Code. In *Gurcharan Singh v. State (Delhi Administration)*<sup>10</sup>, the Supreme Court was called upon to decide upon the legality of an order passed by the high court cancelling the bail granted by the court of session on an apprehension that the accused will tamper with the witnesses and evidence. The Court clarified the position as under and the same has been the law ever since:<sup>11</sup>

Under Section 439(2) of the new Code a high court may commit a person released on bail under Chapter XXXIII by any Court including the court of session to custody, if it thinks appropriate to do so. It must, however, be made clear that a court of session cannot cancel a bail which has already been granted by the high court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the high court. If, however, a court of session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the high court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the high court for cancellation of the bail. This position follows from the subordinate position of the court of session vis-a-vis the high court.

Subsequent judgments have taken forward this discussion and differentiated between cases where the cancellation of the bail is sought on the basis of supervening

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9 *Rubina Zahir Ansari v. Sharif Altaf Furniturewala* (2014) SCC OnLine Bom 210.

10 (1978) 1 SCC 118.

11 *Id.* at 124, para 16.

circumstances which arose from facts which happened after the order granting bail was given or facts which were not before the judge while passing the order granting bail and cases where cancellation of bail is sought on the grounds that the order granting bail is illegal or perverse.

Since an aggrieved party cannot prefer an appeal against an order granting bail, it has been a constant practise to challenge the legality of an order granting bail by filing petition under section 439(2) of the Code. As mentioned above, the usual practise is to list the petition before the same judge. If the grounds for cancellation are not based on supervening events or facts which come to the notice of the prosecution (consequently, the court), then it leads to an anomalous situation where the Court has to review its own orders. The reader knows that under section 362 of the Code, a court is barred from reviewing its own orders.

In the case of *Abdul Basit*<sup>12</sup>, a single judge of the high court had cancelled a bail granted by another single judge on the ground that the accused had misrepresented before the court in order to obtain the bail. The Supreme Court reiterated that the high court could not have reviewed its own order considering the bar under section 362. In the words of the Court:<sup>13</sup>

In the instant case, the order for bail in the bail application preferred by the accused-petitioners herein finally disposes of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Code, the High court becomes *functus officio* and Section 362 of the Code applies herein barring the review of judgment and order of the Court granting bail to the petitioner-accused. Even though the cancellation of bail rides on the satisfaction and discretion of the court under Section 439(2) of the Code, it does not vest the power of review in the court which granted bail. Even in the light of fact of misrepresentation by the petitioner-accused during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition.

In a recent decision, the petitioner had challenged an order of cancellation of bail issued by a special judge under the Prevention of Corruption Act, 1988 whereby an order of the addl. sessions judge granting bail to the accused was cancelled on the ground that the former did not have the jurisdiction to try the case. The high court set aside the order of the special judge on the ground that the special judge,

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12 (2014) 10 SCC 754.

13 *Id.* at 766.

being a court exercising concurrent jurisdiction with the addl. sessions judge is concerned, did not have the jurisdiction to cancel the bail granted by the latter.<sup>14</sup>

Thus, it can be concluded that if the cancellation of bail is sought on the basis of any supervening event or a fact which was not known to the prosecution (and the court) while granting bail, then the petition under section 439 (2) or section 437 (5) can be filed before the very same court. However, if the legality of the order granting bail is being challenged by way of a petition under section 439 (2), then the same has to be done before a Court which is higher in the judicial hierarchy. That is, if it is an order of the magistrate which grants bail then a petition under section 439 (2) can be filed before the court of session or the high court. However, if the order granting bail was passed by the court of session, then its legality can only be challenged before the high court. In the event that the high court has granted bail, then the legality of that order can only be challenged before the Supreme court. Even the Supreme court, which has vast powers, is guided by the very same principles that would bind other Courts while considering applications under section 437 (5) or section 439 (2) of the Code.<sup>15</sup> The reader is advised to appreciate the judgments in *Gurcharan Singh, Dolat Ram*<sup>16</sup>, *Puran, Narendra K Amin* and *Abdul Basit*, (discussed above) in the given order, to truly appreciate this aspect.

### III Judicial discipline and propriety

In the case of *Harjeet Singh v. State of Punjab*,<sup>17</sup> it was highlighted that there is a long-standing convention and requirement of judicial discipline in place that subsequent application for grant or cancellation of bail should be placed before the same judge who had passed the earlier order. In *Harjeet Singh*, a single judge of the high court cancelled a bail granted by another single judge of the same high court on the ground that the latter had wrongly appreciated the facts. While setting aside the order of the high court cancelling the earlier grant of bail, the Supreme Court observed:

In our view, the submission made by the learned counsel for the appellant is a justified one. It was not open to the other Judge of the High Court to sit in appeal against the order passed by coordinate Bench of the same Court. If the accused had obtained bail order by

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14 *Pramod Garg v. State of NCT of Delhi* 2017 SCC OnLine Del 12533.

15 *Kanwar Singh Meena v. State of Rajasthan* (2012) 12 SCC 180 at para 10.

16 *Gurcharan Singh v. State (Delhi Administration)* (1978) 1 SCC 118; *Dolat Ram v. State of Haryana* (1995) 1 SCC 349; *Puran v. Ram Bilas* (2001) 6 SCC 368; *Abdul Basit v. Mohd Abdul Kadir* (2014) 10 SCC 754; *Dr. Narendra K Amin v. State of Gujarat* (2008) 13 SCC 584.

17 (2002) 1 SCC 649.

misrepresentation or by suppression of facts, it was for the State Government or the aggrieved party to approach the appropriate higher forum. In any case, for cancellation of the bail on the ground of misrepresentation or misstatement, the matter ought to have been placed before the same Judge.

The practice of placing bail/cancellation of bail applications before the same judge who considered the earlier applications ensures that contradictory and conflicting orders are not passed in the same case. It also ensures that the victims and public at large do not get a perception that the accused is not selecting the bench to hear his/her case. However, the position in *Harjeet Singh* was clarified in the case of *Mehboob Dawood Shaikh v. State of Maharashtra*<sup>18</sup>, wherein the order granting bail to the accused was set aside by a different single judge of the high court on the basis of *prima facie* satisfaction that the accused, after being enlarged on bail, attempted to threaten some of the witnesses. The Court said that since the cancellation of bail was sought based on facts and circumstances wholly different from those, which weighed on the court at the time of granting bail, there was no need to strictly adhere to the rule of placing it before the same judge. Although it is desirable that the same judge who granted bail hears the application for cancellation of bail, since the bail was cancelled because of supervening events and a completely different set of facts, the same judge need not hear it. Any party aggrieved by such an order ought to show as to how he/she was prejudiced by the fact that a different judge heard the application for cancellation of bail. The question of prejudice arises only when on the same set of facts, a different order is passed by another judge cancelling the bail or granting the bail as the case may be.

#### **IV Grounds for cancellation**

It is now a settled proposition that cancellation of bail is an order, which interferes with the liberty of the individual. Hence, it must not be lightly resorted to.<sup>19</sup> It stands on a footing different from that of rejection of bail and hence the criteria applied for both these scenarios are also different.<sup>20</sup> The Supreme Court in *Aslam Babalal Desai v. State of Maharashtra*,<sup>21</sup> distinguished between a case of bailable and a non-bailable offence. According to the court, it is easier to reject a bail application in a non-bailable case than to cancel a bail once granted. That is because cancellation of bail interferes with the liberty already secured by the accused

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18 (2004) 2 SCC 362.

19 *Aslam Babalal Desai v. State of Maharashtra* (1992) 4 SCC 272 at 289-90, para 11.

20 *Ibid.* Also see, *Nityanand Rai v. State of Bihar* (2005) 4 SCC 178; *Mehboob Dawood Shaikh v. State of Maharashtra* (2004) 2 SCC 362.

21 (1992) 4 SCC 272.

either on the exercise of discretion by the court or by the thrust of law. More specifically, the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection.

In a plethora of decisions, the Supreme Court has identified and listed out a list of circumstances in the nature of being supervening circumstances, which could warrant an order from the court leading to cancellation of bail. The list in the words of the court itself is illustrative and not exhaustive. The latest in the series of decisions by the Supreme Court to illustrate the same is the case of *Abdul Basit v. Mohd Abdul Kadir Chaudhary*.<sup>22</sup> Broadly the grounds for cancellation of bail are as follows (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc.<sup>23</sup> The said list has been relied upon by the Law Commission of India in its 268<sup>th</sup> Report as well.

The above list being illustrative highlights the grounds on the basis of which an order for cancellation is often granted. These primarily deal with supervening events or events, which happened after the grant of the bail. However, judicial pronouncements have broadened the horizons of the powers of the courts under Section 439 (2). It is now clarified that an order granting bail, which is tarnished by patent illegality or perversity and which does not assign reasons for the order can definitely be set aside in a proceeding under the said provision<sup>24</sup>. An order granting bail based on irrelevant material or an order, which does not take into consideration relevant material, can also be cancelled under the said provision<sup>25</sup>. In *Prakash Kadam v. Ram Prasad Vishwanath Gupta*,<sup>26</sup> it was held that if there are serious allegations against the accused, his bail may be cancelled even if he has not misused the bail granted to him. The Supreme Court has even gone to the extent of holding that illegality or perversity of the order granting bail is an “independent ground” for cancellation of bail.<sup>27</sup>

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22 (2014) 10 SCC 754.

23 *Id.* at 761, para 14.

24 *Dr. Narendra K Amin v. State of Gujarat*, *Puran v. Rambilas* (see *supra* note 16)

25 *Nityananand Rai v. State of Bihar* *supra* note 20, *Kanwar Singh Meena v. State of State of Rajasthan* *supra* note 15.

26 2011 (2) Crimes (SC) 279.

27 *Gulabrao Baburao Deokar v. State of Maharashtra* (2013) 16 SCC 190 at 204.

Similarly, in case of a “default bail” under section 167 (2) of the Code,<sup>28</sup> in the event of the prosecution curing its defects/default by filing a charge sheet or otherwise, the court of session as well as the high court are empowered to cancel the bail and take the accused into custody.<sup>29</sup>

It is clear from the discussion above that in situations where the legality of the bail order is under challenge, an application for cancellation of bail has to be made to a court superior to the one which has granted bail. However, the superior court does not sit in appeal over the order granting bail. Especially, when there is no allegation that the accused is interfering with the investigation or tampering with the witnesses/evidence. The petitioner has to show cogent and overwhelming circumstances for cancellation of bail. In the case of *State v. Imran Khan*,<sup>30</sup> the Bombay high court was approached by the state seeking the cancellation of a bail order issued by the Special court based on jurisdictional errors. The high court refused to entertain the said petition taking into consideration the delay involved in the filing of the said petition as well as the lack of cogent and overwhelming circumstances calling for such cancellation.

It also appears that if the court granting bail has not considered certain relevant facts while granting bail, the same would weigh over the court as against the apparent compliance of the accused with the conditions of bail.<sup>31</sup> As far as making a case out for cancellation before the court, the Courts have given certain flexibility to the prosecution. The facts establishing the said grounds for cancellation need not be proven beyond reasonable doubt. Since these are ‘incidental matters’ the standard of proof required is similar to that of civil cases, that is, ‘preponderance of probabilities’.<sup>32</sup>

### V Conclusion

Courts have, over time, tried to differentiate between cancellation of bail and “challenge to an order granting bail.”<sup>33</sup> The illusory nature of this distinction has also been clarified by the Supreme court on numerous occasions.<sup>34</sup> Although the considerations for both are different, the effect is still cancellation of a bail, regular

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28 A Bail by default is separately discussed under Chapter Seven entitled “Default Bail” in this book.

29 *Supra* note 22.

30 (2017) SCC OnLine Bom 9441.

31 *Court on its own motion v. Manisha* (2017) SCC OnLine Bom 9323.

32 *State (Delhi Administration) v. Sanjay Gandhi* (1978) 2 SCC 411. Also see, *Mahmood Dawood Shaikh v. State of Maharashtra* (2004) 2 SCC 362.

33 See, *Jarasindhu Choubey v. Amresh Choubey* (2012) 12 SCC 455, *Neeru Yadav v. State of Uttar Pradesh* (2016) 15 SCC 422.

34 *Kanwar Singh Meena v. State of Rajasthan* *supra* note 15 at para 10.



or anticipatory, which has already been granted. Considering the overall trajectory of developments in this area it is clear that the approach towards bail in India has evidently become stringent as also reflected in the modern legislations and the rigidity adopted by the courts in the grant of bail. However, the general principles regarding cancellation of bail remain rather unchanged. Keeping in mind the fact that obtaining an order of bail today is an arduous task, it is only in tune with the Constitutional values of protecting life and liberty as well as the larger interests of the society that these principles stay unchanged.