

C.B.I. Vs Dinesh Kumar Singh

Criminal Misc. Bail Application Nos. 216, 217 and 218 of 2014

Court: Allahabad High Court

Date of Decision: July 15, 2014

Acts Referred:

Constitution of India, 1950 – Article 225#Criminal Procedure Code, 1973 (CrPC) – Section 164, 437, 439, 439(2), 465#Evidence Act, 1872 – Section 114, 114(e)

Citation: (2014) 86 ALLCC 544

Hon'ble Judges: Amreshwar Pratap Sahi, J

Bench: Single Bench

Advocate: Dileep Kumar, Rajrshi Gupta and Anurag Khanna, Advocate for the Appellant; D.K. Singh, Ajatshatru Pandey, Manoj Kumar Srivastava, P. Chakravarty and P.K. Gupta, Advocate for the Respondent

Final Decision: Allowed

Judgement

Amreshwar Pratap Sahi, J.

The history of this unusual determination with relevant facts and details have been extensively narrated in a

prelude, that took shape of an order by a Division Bench on 16.1.2014, upon a reference being made in a recall application by a Bench presided

over by Hon"ble the Chief Justice vide order dated 13.12.2013. It is, therefore, unnecessary to sketch the background, which can be easily

retrieved from the Division Bench order dated 16.1.2014 and also the orders passed by this Court on 1.4.2014 on the two correction

applications. The larger question of upholding the Majesty of Law while abiding by the Rule of Law is basically the concern of this Court while

delivering this order, coupled of course with some fundamental questions of authority and jurisdiction giving rise to this case.

2. These three bail cancellation applications have been filed praying for cancelling the bail granted to the accused Dinesh Kumar Singh and Ram

Prasad Jaiswal respectively in cases arising out of the NRHM scam. It is to be noted that the accused had been granted bail by a learned Single

Judge of this Court on 5.12.2013 by a common order in which the accused had filed two correction applications. The learned Judge passed

orders on the same. Before the orders could be actually executed a recall application was filed by the C.B.I. for recalling the orders passed on the

correction application dated 11.12.2013. When this fact was brought to the knowledge of Hon"ble the Chief Justice then a Bench presided over

by Hon"ble the Chief Justice on 13.12.2013 passed orders suspending the execution of the bail orders as well the orders on the correction

application and directed the hearing of the recall application by a Bench as nominated by Hon"ble the Chief Justice. The recall application was

heard by a Division Bench on 16.1.2014 and it was allowed. As a consequence whereof the orders passed on the correction applications on

11.12.2013 were recalled and the correction applications were directed to be heard by the appropriate Bench. Hon"ble the Chief Justice

thereafter was pleased to nominate this Bench to hear the correction applications on which orders were passed on 1.4.2013.

3. It was noticed by this Court that bail cancellation applications had already been filed by the C.B.I. and, therefore, the correction applications

should be heard along with these bail cancellation applications. Consequently, since all these matters have been nominated to this Bench by

Hon"ble the Chief Justice, learned Counsel for the C.B.I. and for the accused have been heard at length. The accused have filed a response to the

bail cancellation applications which is on record.

4. Sri Anurag Khanna, learned Counsel for the C.B.I., has urged that a common ground in all the three applications is that the bail has been

granted to the accused on irrelevant considerations but in Bail Cancellation Applications No. 216 and 217 it has been urged that there is an

additional ground of want of jurisdiction by the learned Judge to have granted bail. He submits that, as a matter of fact, only Bail Application No.

4314 of 2013 was nominated to the learned Single Judge by Hon"ble the Chief Justice whereas she proceeded to grant bail in the other two

applications No. 4310 and 8237 of 2013 as well which had not been nominated to her. Sri Khanna has invited the attention of the Court to the

observations made by the Division Bench in the judgment dated 16.1.2014 as also in the orders passed by this Court on the correction

applications dated 1.4.2014 to that effect. He submits that since jurisdiction goes to the root of the matter, and since the learned Judge had no

authority under the roster assigned to her, the orders in the other two bail applications, namely, Bail Application No. 8237 of 2013 and 4310 of

2013, deserve to be cancelled. For this he has placed reliance on two judgments of the Apex Court in the cases of Balvant N. Viswamitra and

Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others, , and Cantonment Board and Another Vs. Church of North India,

5. Sri Khanna then proceeded to point out the ingredients of irrelevant considerations on the strength of several decisions of the Apex Court to

urge that the powers u/s 439(2) of the Criminal Procedure Code can be exercised by the High Court and has cited the following cases:--

(i) Dinesh M.N. (S.P.) Vs. State of Gujarat,

(ii) Dr. Narendra K. Amin Vs. State of Gujarat and Another,

(iii) Kanwar Singh Meena Vs. State of Rajasthan and Another,

(iv) Central Bureau of Investigation Vs. V. Vijay Sai Reddy,

6. He further submits that the bail cancellation application is very much maintainable for the reasons disclosed in the bail application as well as the

response filed by the respondents themselves. For this he has relied on the decisions of the Apex Court in the cases of Gurcharan Singh and

Others Vs. State (Delhi Administration), and R. Rathinam Vs. State by DSP, District Crime Branch Madurai District, Madurai and Another,

7. Coming to the merits of the relevancy for consideration, he contends that the learned Single Judge who granted bail on 5.12.2013 has recorded

perverse facts relating to the status of the accused as Government servants. For this he has invited the attention of the Court to the recitals

contained in the order dated 5.12.2013, and to substantiate his submissions, he falls back upon the counter affidavit filed by the respondents to the

bail cancellation application. He submits that the respondents themselves have now admitted on record that they are Government servants and,

therefore, the recitals that the accused were not Government servants is an incorrect recital and was, therefore, an irrelevant fact taken into

consideration that has resulted in miscarriage and failure of justice. He, therefore, submits that in view of the law laid down by the Apex Court, the

aforesaid recital relating to the status of the accused which heavily weighed with the learned Single Judge to grant bail was a totally irrelevant

consideration.

8. Sri Khanna further contends that the respondents-authority themselves admitted that they were not claiming parity with any of the other accused

who have been granted bail, yet the learned Single Judge has proceeded to grant bail on parity. He, therefore, submits that the accused applicants

have not even prayed for any such consideration and, therefore, the learned Single Judge has committed a gross error by proceeding to grant bail

on such irrelevant considerations.

9. The third contention raised by Sri Khanna is in relation to the medical ground taken by the accused Ram Prasad Jaiswal in his bail applications.

He submits that the recital in the order while granting bail to the accused Ram Prasad Jaiswal that the C.B.I. had not denied the allegations relating

to the medical ailment of Ram Prasad Jaiswal is a totally wrong recital and against the record inasmuch as the counter affidavit which had been filed

by the C.B.I. had denied such allegations. He, therefore, submits that not only the grant of bail was erroneous, but the grounds taken for grant of

bail were totally irrelevant and in view of the decisions relied upon by him the bail granted to the applicants deserves to be cancelled.

10. Sri Khanna has then urged that the period of incarceration is absolutely immaterial in such serious crimes having wide ramifications where the

trial deserves to be concluded at the earliest and has not proceeded swiftly.

11. Replying to one of the contentions raised on behalf of the accused in their application to reject the bail cancellation application, Sri Khanna has

invited the attention of the Court to the words used in sub-section (2) of section 439 to urge that an application would be maintainable after an

order of release has been passed. To substantiate his submission Sri Khanna has relied on the decision in the case of Assistant Collector of

Customs (P), Bombay Vs. Madam Ayabo Atenda Ciadipo Orisan and another, in particular. He has also brought to the notice of the Court the

other decisions which have been referred to in the said judgment but on the strength of the judgment of the learned Single Judge, Sri Khanna

submits that this Court should adopt the same reasoning to conclude that the application filed by the C.B.I. for cancellation of bail is maintainable,

as, an order of release, has already been passed herein. The contention is that an actual physical release is not a sine qua turn for moving of a bail

cancellation application.

12. Sri Gopal Chaturvedi spearheaded the arguments on behalf of the accused accompanied by Sri Satish Trivedi Senior Advocate who has

adopted the same, and by Sri Dilip Kumar Advocate as well. Sri Chaturvedi submits that in so far as the bail cancellation application in the case of

D.K. Singh being 216 of 2014 and that of R.P. Jaiswal in bail cancellation application No. 217 of 2014 is concerned, the argument that has been

advanced for want of jurisdiction is misplaced. He submits that the learned Judge bona fide and rightly proceeded to deal with and pass orders in

all the three bail applications. He submits that there was no inherent or patent lack of jurisdiction as urged by Sri Khanna and for this he has invited

the attention of the Court to the facts stated in the supplementary affidavit filed in support of the correction applications. The same affidavit is being

relied upon for all the three cases. To be precise the said supplementary affidavit has been filed in correction application No. 363101 of 2013 in

bail application No. 8237 of 2013, Dinesh Kumar Singh v. C.B.I. The affidavit is dated 17th April, 2014.

13. Sri Chaturvedi has specifically invited the attention to the averments contained in paragraphs 3 to 12 thereof to urge that the order that was

passed for connecting the bail applications earlier on 24.7.2013 was by an Hon"ble Judge who had the jurisdiction to hear such matters.

Consequently, a judicial order connecting the bail applications was a valid order and all the three matters were listed collectively on 4th October,

2013 when the cases were released by the learned Judge. He submits that no objection at any stage of the listing of the cases was ever taken by

the C.B.I. and they have been heard together by all the Hon"ble Judges including the learned Single Judge who finally heard and granted bail. He

has invited the attention of the Court to the cause list dated 27.11.2013, 2.12.2013, 4.12.2013, 5.12.2013 to contend that all the three matters

were being continuously listed before the same Judge and no objection was raised with regard to the nomination order not being available in bail

application Nos. 4310 and 8237 of 2013.

14. Apart from this, he submits that the arguments extended over two or three days and never did the learned Counsel for the C.B.I. raise any

objection to the hearing by the same Judge. He submits that the order connecting the bail applications that were earlier passed by Hon"ble Justice

Virendra Vikram Singh who had later on released the matter, was a valid judicial order and in this background when bail application No. 4314

which was also connected with the other bail applications, came to be nominated by Hon"ble the Chief Justice, then the only presumption which

can be drawn is that it was a conscious order keeping in view the aforesaid orders of connecting all three applications.

15. He submits that if the learned Counsel for the C.B.I. had any objection he ought to have raised it or pointed it out to the Registry for obtaining

orders if it was at all required. The office bona fide listed it before the learned Single Judge treating all the matters to be connected and for this he

also submits that a presumption should be drawn in favour of accused that Hon"ble the Chief Justice while nominating one of the bail applications

had issued directions for the matters being heard by the same learned Single Judge. He submits that there is no material to the contrary to presume

that all the three cases were never intended to be heard by the same learned Judge. He submits that drawing support from section 114(e) of the

Evidence Act, the judicial act of the learned Judge who had heard the matter, was a regular exercise of authority, which did not suffer from any

infirmity and the learned Judge did not commit any error in proceeding to decide all the three bail applications.

16. Replying to the submissions of Sri Khanna, he contends that this Court while proceeding to observe in the division bench order dated

16.1.2014 and the order passed by this Court on 1.4.2014, has nowhere finally decided the issue of want of jurisdiction and therefore the

submission of Sri Khanna that the said orders of the Division Bench are binding and final, is incorrect. He contends that the process adopted by the

learned Judge having not been objected to, and being bereft of any illegality or impropriety, cannot be described as an act without jurisdiction. He

submits that the observations made by the Division Bench in the order dated 16.1.2014 and by this Court on 1.4.2014 do not attach any finality to

the aforesaid observations and hence the argument on behalf of the C.B.I. should be rejected.

17. To substantiate his submission Sri Chaturvedi contends that this Court in the case of Rameshwar Prasad Vs. State, has held that an application

for bail cancellation would not be maintainable unless there is an actual physical release of the accused. In the instant case, since there was no

actual release of the accused, the application itself is incompetent. He has further invited the attention of the Court to the decision of the learned

Single Judge of the Bombay High Court in the case of Yunus Hussain Rathod and others Vs. The Assistant Collector of Customs (Preventive),

Bombay and another, to support his submission.

18. He has then invited the attention of the Court to section 465 Cr.P.C. to contend that unless it is established that there has been failure of justice

an order passed by a competent Court is not reversible. He has further urged that the correction applications were rightly filed and they did not

suffer from any invalidity and neither did the learned Single Judge commit any error by entertaining the correction applications.

19. Coming to the merits of the bail cancellation application, he submits that the contention that the co-accused have been erroneously let off

treating them to be not Government servants, has to be understood in the context of the facts already on record which cannot be altered. The

alleged incorrect recital in the order about the accused not being Government servants and granting parity of bail with Saurabh Jain and P.K.

Bhukesh has to be understood in the context, that the learned Judge has not only taken into consideration the relevant facts relating to the grant of

bail on merits, but also the age of the applicant Ram Prasad Jaiswal and his medical background. He further submits that the issue of the statement

of the accomplice recorded u/s 164 Cr.P.C. was also argued by the C.B.I. and that was also considered, whereafter the bail was granted. He

submits that the period of incarceration is a relevant consideration and even otherwise the ultimate conclusion of granting bail, which is the finality of

the discretion exercised, does not get affected by any alleged incorrect recital as the accused were even otherwise entitled for bail. He contends

that this Court does not hear an appeal in a bail cancellation and there are only limited grounds available to the Court to hear such bail cancellation

applications. He contends, if the application itself is incompetent, and there are no irrelevant considerations as alleged, then the bail cancellation

application deserves to be rejected.

20. The argument of Sri Chaturvedi raised a strong debate in relation to the competency of the bail cancellation application. The contention on

behalf of the accused is that first the accused has to be released on bail. A bail can only be granted provided the accused is in custody. Thus the

contention is that actual release is necessary and a mere order of bail without any physical release cannot allow the Court to invoke the powers

under sub-section (2) of section 439. Thus in the present case the bail cancellation application is not maintainable. The contention of Sri Chaturvedi

is that the accused have to be taken back into custody which situation does not arise in the present case, inasmuch as, the accused on account of

the recall order passed on the correction application have remained in Custody. This aspect according to Sri Chaturvedi has not been considered

by the learned Single Judge of the Bombay High Court in the case of Assistant Collector of Customs (supra).

21. He further submits that such a situation had not arisen before the Bombay High Court or even before this Court, inasmuch as, the cases which

have been cited at the Bar in this connection relate to the exercise of powers by the learned Sessions Court and not by the High Court where the

inherent powers u/s 482 Cr.P.C. are also available.

22. He has further advanced reasons in support of his arguments. Sri Chaturvedi submits that a bail cancellation after a person is released lies on

account of subsequent circumstances that arise after the release of an accused, namely, if he has misused the bail and there are reports of

tampering of witnesses or otherwise there is failure or miscarriage of justice. In the instant case none of the said ingredients were available for

moving of these applications and as such there was no occasion for the C.B.I. to have moved the applications.

23. He as a last measure also vehemently urged that the C.B.I. did not take any interest in moving applications for cancellation of the other co-

accused who have been granted bail by the High Court. No special leave petitions have been filed challenging the orders by which bail has been

granted to the co-accused and in such circumstances this selective moving of a bail cancellation application, which is not maintainable in law, does

not appear to be a bona fide attempt on the part of the CBI.

24. He therefore contends that the correction applications which do not suffer from any infirmity be allowed and the bail cancellation applications

be rejected.

25. The most important thing in communication is to hear what isn't being said. This is more necessary when the Court is addressed with deft

advocacy. The learned Counsel for the C.B.I. and the accused have put in their best to the satisfaction of the Court. The professional accuracy and

precision of both sides reminds the Court of ""A layman knows he has to kick it; an amateur knows when to kick it; a professional knows how

hard."" Having heard learned Counsel for the parties and having considered the submissions raised, the issue relating to the jurisdiction of the

learned Judge to proceed to hear the matter comes first in relation to two of the bail applications which had admittedly not been nominated to the

learned Judge. At the very outset the prima facie view expressed by the Division Bench in the order dated 16.1.2014 in this very case requires a

reiteration as it has been relied on by the learned Counsel for the C.B.I. and is also relevant for the purpose of the present issue. The extract of the

order which covers this part of the argument:--

More alarmingly the issue relating to the jurisdiction of the learned Single Judge to hear all the three bail applications when only one was

nominated to her gains significance. A Court not having been assigned the roster, the presiding Judge cannot assume jurisdiction without

nomination. There cannot be a presumption of implicit or implied nomination. Needless to mention that the Chief Justice is the master of the roster

and the powers to nominate a case and the jurisdiction of a learned Judge to hear the same are all well defined and circumscribed as per the

parameters laid down in the case of State of Rajasthan Vs. Prakash Chand and Others,

The Full Bench decision of the Allahabad High Court in Sanjay Kumar Srivastava v. Acting Chief Justice 1996 AWC 644, was quoted with

approval in the following words:--

.....The learned Judge then went on to observe:

In view of the above, it is clear that the Chief Justice enjoys a special status not only under the Constitution but also under Rules of Court, 1952

made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of

the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or to Judges sitting in Full Bench. He alone

has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges.

The conferment of this power exclusively on the Chief Justice is necessary so that various Courts comprising of the Judges sitting alone or in

Division Bench etc., work in a coordinated manner and the jurisdiction of one Court is not overlapped by other Court. If the Judges were free to

choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would

collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or

a particular case. The nucleus for proper functioning of the Court is the ""self"" and ""judicial"" discipline of Judges which is sought to be achieved by

Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction

and sittings.

(Emphasis ours)

23.The above opinion appeals to us and we agree with it.....

26. It is at this juncture that the argument advanced by Sri Chaturvedi for drawing a presumption of a regular judicial act as per provisions of

section 114 illustrations (e) has to be considered. To my mind, the argument which has been advanced by Sri Chaturvedi misses the point that the

presumption has to be about the regular performance of the act of the Judge. His argument that it is just a matter of procedure and therefore the

said illustration is attracted cannot be applied on the facts of the present case the reason being it was not a mere matter of procedure but a matter

of conferring the jurisdiction on the learned Single Judge to hear the bail.

27. To my mind, the presumption is to be drawn in matters of procedure and not actual performing of the act where the issue goes to the root of

validity of the order. It is not a routine performance that is under question. It is the very competence or the authority of the learned Judge

performing that act which is in question. It is for this reason that the aforesaid illustration presumes the performance of a regular exercise of power.

If the regularity itself is in question then the presumption of the said act touching the irregularity is not covered by the said illustration. There cannot

be any presumption in law about an official act being regularly performed when the act itself on the face of it was unauthorised. The said illustration,

therefore, does not come to the aid of the accused where there is an inherent lack of authority to proceed with a matter. In the light of the aforesaid

conclusion, the observations of the Division Bench extracted hereinabove squarely apply on the facts of the present case as the Chief Justice had

been pleased to nominate only one case and not the other two bail applications.

28. It would be appropriate to refer to the explanation added to the aforesaid illustrations u/s 114 which begins with the sentence ""but the Court

shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it--.....as

to illustration (e)--a judicial act the regularity of which is in question, was performed under exceptional circumstance.

29. There is no material placed on behalf of the accused to indicate that such act was performed in an exceptional circumstance. Sri Chaturvedi

could not point out as to what was that exceptional circumstance under which the learned Judge had no option but to entertain and grant bail in the

other two applications which were not nominated to her.

30. To the contrary, the presumption is of the facts as exist when the order was passed in respect of nomination, which was admittedly and

undoubtedly only in one bail application, that is bail application No. 4314 of 2013. The other two bail applications 4310 of 2013 and 8237 of

2013 were not nominated to the learned Judge at all.

31. Sri Chaturvedi submits that when there was a judicial order connecting all the three bail applications by the regular Court earlier, then there is

every reason to believe that when the nomination order was passed in one bail application, the learned Single Judge was obviously proceeding

regularly to here all three matters to which no objections had been raised by the learned Counsel for the C.B.I. at that stage. So far as the issue of

objection by the C.B.I. Counsel is concerned, it is by now settled that jurisdiction to hear a matter cannot be conferred either by tacit or by implicit

consent or by omission to raise an objection to the jurisdictional issue.

32. Sri Khanna is right that an issue of jurisdiction can be raised if it goes to the root of the matter and in the instant case as per the law extracted

hereinabove, to my mind, it was the duty of the Court itself to have determined as to whether the other two bail applications were competent

before the Court or not. In the event of any doubt or confusion, clarifications could be had from Hon"ble the Chief Justice who alone had the

authority to nominate the other two cases. Once the nomination was only in one case, then propriety demanded that the learned Counsel as well as

the Court ought to have taken notice of this fact and made a request to the Hon"ble Chief Justice for passing appropriate orders. There cannot be

a facilitating argument accepted that the Registry was conscious of such nomination and had rightly listed the case before the learned Judge. It

would be appropriate to opine that the Registry or the office does not perform a delegated function of the Chief Justice for sending matters to a

Court except under the orders of the Chief Justice. Not only this, when an order nominating a particular case is passed then the Registry is obliged

only to list and place such a case with a report to that effect. Any lack of clarity should therefore be noticed and brought to the notice of Hon"ble

the Chief Justice for exercise of powers under Chapter V of the Allahabad High Court Rules, 1952. Neither the Registry nor the parties to the

litigation can take any advantage of any such confusion.

33. Sri Dilip Kumar in addition to these arguments had invited attention of the Court to the order of the learned Judge dated 27.11.2013 to

contend that as a matter of fact the material is to the contrary which would indicate that there was no effort on the part of the learned Counsel for

the accused to get the matter heard and it was the learned Judge herself who listed the matter peremptorily on 2nd December, 2013. He therefore

submits that nothing can be attributed which may even remotely indicate any anxiety on the part of the Counsel to get the other two matters heard

by the same Judge. This argument pales into insignificance keeping in view the outcome of the orders where the accused have been benefited and

have been granted bail. This aspect therefore nowhere dilutes the issue of jurisdiction of the learned Judge to have the authority to hear the other

two bail applications.

34. Apart from this, any such presumption of official act as argued on the strength of section 114(e) of the Evidence Act is always rebuttable and

as is evident the regularity of the act performed by the learned Judge in the present case stands rebutted on facts where there is no order found of

the Chief Justice nominating the other two bail applications. To my mind, this issue of jurisdiction to hear the other two bail applications even if

went uncontested before the learned Judge goes to the root of the matter and the presumption of the regularity of the act clearly stands rebutted on

the facts of the present case. There is no permissive presumption of an irregular act which is without authority. The High Court Rules, 1952 under

Chapter V empowers Hon"ble the Chief Justice to pass orders on a case to be heard by a particular Judge. Here the learned Judge admittedly did

not have a normal roster of hearing such bail applications. To my mind the said procedure forbids any other Judge to hear the matter which is not in

the regular roster or is otherwise not nominated. Section 114(e) of the Evidence Act is therefore not attracted as urged by the learned Counsel for

the accused.

35. It is for this reason that while hearing the correction application, this Court had delivered its order on 1.4.2014 and observed as under:--

Having heard learned Counsel for the parties and having perused the Division Bench order dated 16.1.2014, it is evident that the Division Bench

has clearly held that a matter not assigned to a Judge cannot be treated to be either impliedly or expressly nominated to the same Judge in a similar

matter. It has been held that if a case is nominated, that would by itself not allow the learned Judge to assume jurisdiction in all other similar matters

as the roster is not assigned to the same Judge.

36. There is another aspect that deserves mention. The High Court is statutorily authorised to invoke powers u/s 439(2) where bail has been

considered and release ordered by the Session Court as well as by the High Court. In propriety, one Co-ordinate Bench cannot sit in appeal or

comment on another bench in such matters. A bail granted cannot be cancelled except otherwise in the event of what has been provided under

law. A bail cancellation can however be entertained by the High Court in respect of its own order. The bar against a Co-ordinate Bench hearing a

bail cancellation application is not contemplated under the Cr.P.C. or the High Court rules. Canons of propriety however demand that a bail

granted by a Co-ordinate Bench should not be cancelled except under circumstances permitted by law. The law however permits this on a failure

of Justice as in the words of Lord Atkin ""Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though

outspoken, comments ordinary men.

37. Sri Chaturvedi submits that the learned Judge, not only was authorised to hear all the bails together, but was also justified in proceeding with it

in the absence of any opposition on that score. This argument can be further taken to define limits of Justice in the words of L.J. Bowen in Re

Onward Building Society, [1891] Q.B. 463 at 479:--""It is always undesirable to draw a hard and fast line limiting the powers of the Court to do

justice."" Yet it is wise to remember what Sophocles. (496-406 BC) said ""There is a point at which justice brings harm with it."" This happens when

the law is violated or the limits prescribed are overstepped. The normal roster not being available, and the absence of specific nomination, limited

the discretion of the learned Judge in the other two applications to hear and decide the same as concluded hereinabove.

38. Thus from the conclusions drawn hereinabove, this Court is of the considered opinion that the learned Judge without authority of nomination

could not have proceeded to hear either bail application No. 4310 or bail application No. 8237 of 2013. This being the position, the prayer made

for cancelling the bail on this ground has to be accepted.

39. The reason is not far to see, namely, the issue of want of jurisdiction which was relevant for the purpose of consideration of bail has been

totally ignored. Where the authority to decide the bail application itself is wanting the order dated 5.12.2013 was without authority in law.

40. It is here that the argument of Sri Chaturvedi on the strength of section 465 Cr.P.C. also deserves to be repelled section 465 gets attracted

when there is failure of justice. Where the learned Judge did not have the power to hear a matter and grant bail, then an act performed in

contravention thereof amounts to a failure in upholding the rule of law and delivering justice. This is not a case of reversal, but of a corrective

measure that falls in line with what is inherent, as observed by William Shakespeare in Macbeth, Act I Sc. vii

This even - handed justice commends the ingredient of our Poison'd Chalice to our own lips.

41. The authority of the learned Judge to hear the bail was lacking and wanting and therefore the power exercised to grant bail failed justice.

Consequently, the argument on the strength of section 465 that this Court is prohibited from reversing the order dated 5.12.2013 has to be

rejected.

42. The next argument which deserves notice is the maintainability of the bail cancellation application as urged by the learned Counsel for the

parties. A bail cancellation application, as it is popularly called, is an application which is moved to ensure the arrest and custody of an accused

who has been granted bail on the orders of a Court.

43. Learned Counsel for the accused are right that these contingencies exist as urged by them and not otherwise but in the instant case there is

another dimension which has been argued by the learned Counsel for the C.B.I., namely, if the bail has been granted on irrelevant considerations as

held by the Apex Court and the judgment relied upon by the C.B.I., then too also the Court can exercise its powers issuing directions that the

accused be arrested and taken into custody. It is here where the bail obviously has to be cancelled for taking an accused into custody.

44. The argument which has been advanced by Sri Chaturvedi to define the scope of such powers namely that unless there is actual physical

release, there can be no invoking of such a power under sub-section (2) of section 439, has to be considered in the light of what has been

indicated in the judgment of Assistant Collector of Customs (supra). If the provision of sub-section (2) of section 439 is read plainly then arrest

and custody is a sine qua rum for exercise of such powers by the Court. The power is therefore circumscribed and to that extent the judgment of

the Allahabad High Court by Sri Chaturvedi in the case of Rameshwar Prasad (supra) is attracted. However, the said judgment later on clearly

spells out that such inhibitions are not on the High Court keeping in view the wide and extensive powers available with the High Court under 482

Cr.P.C. It would be relevant to mention that where there are express provisions under the Criminal Procedure Code then ordinarily the powers

under 482 Cr.P.C. should not be pressed into service but where such discretion is available then the High Court will be presumed to have such

inherent powers and it is this aspect which has been indicated in the judgment relied upon by Sri Chaturvedi in the case of Rameshwar Prasad

(supra).

45. The question is of the actual physical release of an accused before the exercise of powers under sub-section (2) of section 439. To my mind, it

is correct that the power is to arrest and take into custody a person who has been released. In the instant case, the facts have to be gone into for

this purpose. The bail was granted to the accused in this case on 5.12.2013. The learned Counsel for the accused in their wisdom found it

necessary to move correction applications for grant of bail as the substantive sections were not mentioned. According to the learned Counsel, it

was not at all necessary and this is what was expressed by the learned Single Judge in the order dated 12.12.2013. This therefore means that even

though the accused, according to their learner Counsel, had already been released, it was a mere correction in the shape of a ministerial act of

removing the error and nothing more than that. The release order according to them was therefore final and had the correction applications not

been moved due to the confusion created by the Court below, it was quite possible that the accused could have been released. They however

contend that the accused continued to be detained and were not actually released.

46. It is therefore to be seen that if the accused had not been physically released due to the pendency of the correction applications and orders

thereon and the subsequent orders passed for hearing of the recall application, can it still be said that the bail cancellation applications were not

maintainable.

47. If the argument of the learned Counsel for the accused is accepted, then the accused stood released by the Court and it was only a matter of

formality for getting orders corrected. On the other hand, if the accused were required to move a fresh application for getting themselves released

under the substantive sections on a new bail order, which were sought to be introduced by way of correction, then they were still in custody in

those sections in which the bail had not been granted, and in that event they cannot be presumed to have been released.

48. In this regard, one of the correction applications stands on a different footing, namely, correction application No. 363101 of 2013 arising out

of Bail Application No. 8237 of 2013. The reason is not far to see as this Court had already observed as under in the order dated 1.4.2014:--

It may be added that in the opinion of this Court, the order dated 11.12.2013 on the reasons given therein was not at all applicable on the facts of

the present correction application and had no bearing at all. The reason is that if the bail order dated 5.12.2013 is not without jurisdiction or

authority, then in that event the nature of the correction claimed in this application on it's face value has to be allowed as the correction appears to

he an apparent error which can be termed as typographical. However, such correction cannot be permitted at this stage for the reasons given

hereinafter.

49. So far as the other correction application is concerned, namely, Correction Application No. 365038 of 2013 arising out of Bail Application No.

4314 of 2013 and 4310 of 2013, the same stands on a different footing on facts. Here the substantive sections were sought to be added about

which an observation was made by the learned Single Judge in her order dated 12.12.2013 which has already been extracted in the order of the

Division Bench dated 16.1.2014. The said opinion of the learned Judge has already been recalled by the order dated 16.1.2014 and therefore it

has now to be seen as to whether the accused Ram Prasad Jaiswal on such facts had actually been released by the Court or not.

50. In my opinion, once the learned Judge who had granted bail had formed the opinion that the accused was supposed to have been granted bail

in all sections, even though the word substantive had not been mentioned in the operative part then in that event this argument is not open to the

learned Counsel, as the accused were released on such orders being passed by the learned Judge. The accused themselves, therefore, were

treating them to have been released under the order dated 5.12.2013 coupled with the order dated 12.12.2013. The accused therefore cannot say

that they had no order in their favour for getting released under the substantive sections.

51. Thus on facts in both the cases the order of release by the High Court was complete with the passing of the order dated 12.12.2013 in both

the applications.

52. The argument therefore which now deserves to be answered is as to whether this was only a paper release and not actual physical release.

53. The words used in sub-section (2) of section 439 have to be read not in a disjunctive way. The power defined therein encompasses with it the

application of mind by a Court on an application before ordering arrest and custody. The application of mind is on the issue of yet another aspect

as has now been interpreted by the Supreme Court in several cases, namely, "irrelevant considerations". Such considerations which may be

described as irrelevant have to be located in the order of release and is not dependant upon actual physical release. As observed by the Bombay

High Court in the judgment of Assistant Collector of Customs (supra), after a release order is passed, it takes time to verify the bail order, the

sureties and other formalities before actual physical release takes place. The consideration, therefore, is not of an actual physical release but of any

irrelevant considerations being the basis of the order of release. Thus the argument of Sri Chaturvedi on such facts and on the ground of irrelevant

considerations does not hold water. A bail cancellation application is moved as in the present case on the ground of want of jurisdiction and

irrelevant considerations. Consequently, the application of mind by the Court to such facts has to be on the irrelevant considerations in the order,

and is not dependant upon the consequential acts of physical release.

54. Coming to the issue of irrelevant considerations which have been vehemently canvassed between the parties, the argument of the learned

Counsel for the C.B.I. had to be accepted on a bare perusal of the order and also the facts stated in the affidavit filed in support of the application

praying for rejecting the bail cancellation dated 4.4.2014 sworn by Nitin Kumar Singh in Bail Cancellation Application No. 216 of 2014.

55. The opinion of the learned Judge in the order dated 5.12.2013 is worth extracting. The arguments of the learned Counsel for the accused was

noted as under:--

From the perusal of the record, it comes out that the applicant. Ram Prasad Jaiswal is not a Government Servant and at the present time he was

not even an elected and sitting M.L.A. He stands at par with the case of other co-accused Saurabh Jain and P.K. Bhukesh who are alleged to be

involved in conspiracy to give the alleged bribe have been granted bail by the other Benches of this Hon"ble High Court vide order dated

23.8.2012 and 20.11.2013.

So far as the accused D.K. Singh is concerned, it is alleged that he is not directly concerned for change the policies and he is alleged to have

persuaded the concerned authority to commit the offence as alleged and as such, he is alleged to be part and parcel of the conspiracy of giving and

taking bribe. As he is not a Government Servant directly involved in the policy taking decision his case too appears to be more or less at par with

other co-accused Saurabh Jain and P.K. Bhukesh who have also conspired or participated or persuaded in this alleged episode.

So far as accused Ram Prasad Jaiswal is concerned, he has also taken medical grounds in paras. 31 to 33 of his affidavit. In reply to the aforesaid

paras, learned Counsel for the respondent C.B.I. in his counter affidavit has said that averment made in para. 31 is matter of record and needs no

comments.

Thus, in para 42 of the counter affidavit filed by the learned Counsel for the respondent C.B.I., it is submitted that the applicant petitioner has not

enclosed any specific medical documents and needs no comments.

The learned Judge has further noted as follows:--

As such, no denial of this fact of the medical ground has been specifically made by the learned Counsel for the respondent in his counter affidavit

and it is submitted that it needs no comments but only needs to be examined with authenticity.

Thus, it comes out that no specific denial of the allegations made in paras. 31, 32 and 33 have been made by the learned Counsel for the

respondent C.B.I. and there is no specific denial of medical ill health of accused applicant Ram Prasad Jaiswal.

Thereafter the learned Judge has proceeded to conclude as under:--

In this regard as pointed out by the learned Counsel for the applicants that two co-accused Saurabh Jain and P.K. Bhukesh standing almost on the

similar footing as discussed in foregoing paras of this order have been enlarged on bail by other Benches of this Hon"ble High Court vide order

dated 23.8.2012 and 20.11.2013. Both these bail order show that the detailed orders discussing all the relevant points have been passed in both

the bail applications of co-accused and on account of parity the present accused applicants Ram Prasad Jaiswal and Dinesh Kumar Singh who are

not Government Servants and almost standing on the similar footing of facts in scam conspiracy with the case of two co-accused Saurabh Jain and

P.K. Bhukesh, they too are entitled to right of equality.

Thereafter learned Judge concluded as under:--

I think it expedient that both the accused applicants Ram Prasad Jaiswal and Dinesh Kumar Singh, standing on the similar footing of facts in the

scam conspiracy with two other co-accused Saurabh Jain and P.K. Bhukesh who have been granted bail by this Court vide order dated

23.8.2012 and 20.11.2013, the present accused applicants Ram Prasad Jaiswal and Dinesh Kumar Singh also be granted bail on the ground of

parity.

Secondly, the applicant Ram Prasad Jaiswal in his affidavit to the bail application in para. 31 to 33 has raised the contention of his medical ill health

which contention has not been specifically denied in the counter affidavit filed by the respondent C.B.I. Thus, in pith and substance it amounts to

the admission of contention raised in paras. 31 to 33, he can be extended the benefit of proviso-2 to section 437 Cr.P.C. and may be enlarged on

bail likewise.

56. From a perusal of the said recitals in the order dated 5.12.2013, it is apparent that the learned Judge treated none of the accused to be

Government servants and granted bail at par with Saurabh Jain and P.K. Bhukesh.

57. On the facts as noted above, it is apparent that there was no parity at all and the assumption of the fact that the accused were not Government

servants was also incorrect and against record. This is clearly evident from the facts stated in the affidavit dated 4.4.2014 referred to hereinabove.

58. The accused were otherwise entitled to bail apart from the grounds of parity and they contend that the other considerations in the bail order

dated 5.12.2013 cannot be said to be irrelevant nor any other ground has been urged by the C.B.I. so as to form an opinion of an irrelevant

consideration. The other argument which has been hammered is that the C.B.I. has adopted a discriminatory and selective attitude by only filing

bail cancellation applications in the present cases whereas several co-accused have been granted bail by the High Court, and in none of them

neither the C.B.I. has filed any bail cancellation nor has challenged the orders before the Apex Court.

59. On the issue of an irrelevant consideration, suffice it to say, that the consideration of a fact which is incapable of being accepted or admitted is

an irrelevant fact. In the instant case, it was not even the case of the accused that they were not Government servants and therefore this assumption

by the learned Judge is against record. The bail has been granted heavily relying on such parity being extended to those who were not Government

servants. Not only this, the learned Judge has relied on the bail orders of the co-accused on the ground that they indicate discussion of the relevant

points and therefore parity was being extended to the accused. The consideration therefore was irrelevant and clearly tends towards perversity.

The consideration has to be of facts which are placed by the parties in support of their contention. If the accused themselves were not claiming any

such benefit and the facts had been merely stated only to inform the Court about the bail orders then the same could not have been made the basis

of consideration for grant of bail. The error therefore in the order dated 5.12.2013 is gross and palpable and is manifest in the record. The

conclusion drawn is such that no reasonable person could possibly come to that conclusion and this has led to failure of justice.

60. There is no opinion or conclusion about the nature of ailment that impelled the Court to consider the medical ground raised, more so when the

assertion in Para. 16 of the counter affidavit of the C.B.I. went unnoticed. Unless the material placed is considered to be bona fide, an assertion or

counter assertion or bald denial by itself would not amount to be a reasonable medical ground to grant bail.

61. To my mind, therefore, the judgment relied upon by the learned Counsel for the C.B.I. deserves mention in Dr. Narendra K. Amin Vs. State

of Gujarat and Another, The Court observed as under:--

23. Even though the reappraisal of the evidence as done by the Court granting bail is to be avoided the Court dealing with an application for

cancellation of bail u/s 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to

what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

62. Another decision Kanwar Singh Meena Vs. State of Rajasthan and Another, , dealing this issue is extracted herein under:--

10. Thus, section 439 of the Code confers very wide powers on the High Court and the Court of Sessions regarding bail. But, while granting bail,

the High Court and the Sessions Court are guided by the same considerations as other Courts. That is to say, the gravity of the crime, the

character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from

justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds are

required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a

particular case may have to be taken into account by the Court. The Court has to only opine as to whether there is prima facie case against the

accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such

assessment of evidence and premature comments are likely to deprive the accused of a fair trial. While cancelling bail u/s 439(2) of the Code, the

primary considerations which weigh with the Court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere

with the due course of justice or evade the due course of justice. But, that is not all The High Court or the Sessions Court can cancel bail even in

cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the Court granting bail ignores relevant

materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant

of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized

principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of

supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the Court

from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing

accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society.

Needless to say that though the powers of this Court are much wider, this Court is equally guided by the above principles in the matter of grant or

cancellation of bail.

63. The decision in case of Central Bureau of Investigation Vs. V. Vijay Sai Reddy, refers to the grant of bail on reasonable grounds for believing

instead of the evidence. Applying the said principle and as concluded herein above the grounds for believing the claim of party as recorded by the

learned Judge is clearly non-existent. There is another fact which deserves mention that the learned Counsel have urged that there was no

opposition or objection to the hearing of the three bail applications by the learned Judge, that the applicant Ram Prasad Jaiswal was entitled for

bail on medical grounds, that the C.B.I. has failed to file any application for cancelling the bail of the other co-accused and finally the applicants are

entitled to be otherwise released on bail. The same have been answered hereinabove but it would be apt to mention that the Court does not

proceed merely because there is no effective opposition. It is here that one has to keep in mind what Lord Justice Ackner said ""Convenience and

justice are often not on speaking terms"" (Observer dated 25.10.1981). Consequently, the bail orders proceed on irrelevant considerations and

therefore they deserve to be cancelled. Accordingly, for the reasons hereinabove, the order dated 5.12.2013 granting bail to the accused stands

cancelled. The accused shall not be released and remain in custody until ordered by a Court of competent jurisdiction.

The bail cancellation applications are allowed.