

(2012) 06 CAL CK 0018**Calcutta High Court****Case No:** C.R.M. No. 5257 of 2011

Santi Jha

APPELLANT

Vs

Gurdip Singh Saluja @ Dip

RESPONDENT

Date of Decision: June 28, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 438, 439, 439(2)
- Penal Code, 1860 (IPC) - Section 120B, 302

Citation: (2012) 5 CHN 130**Hon'ble Judges:** Tapen Sen, J; Dipak Saha Ray, J**Bench:** Division Bench**Advocate:** Kazi Safiullah, Madhuri Das, Kazi Abrarullah and S. Rahaman, for the Appellant; Tirthankar Ghosh, Sayan De and Satadru Lahiri for the Respondent No. 1 and Siladitya Sanyal for the State, for the Respondent**Judgement**

Tapen Sen, J.

This is an application u/s 439(2) of the Code of Criminal Procedure, 1973 for cancellation of bail granted to the respondent No. 1 (Gurdip Singh Saluja @ Dip) in connection with Siliguri P.S. Case No. 446 of 2010 dated 05.8.2010 under sections 302/120B of the Indian Penal Code corresponding to G.R. Case No. 1302 of 2010 granted by the learned Additional Sessions Judge, 1st Court, Siliguri on 10.01.2011. At this stage, we are not inclined to deal with the facts because in an application for cancellation of bail, the same has to be dealt with on the basis of the grounds made out therein. We have noticed that this Court had rejected the prayer for anticipatory bail of the respondent No. 1 on 13.9.2010. Thereafter on 02.12.2010, the learned Sessions Judge, Darjeeling rejected the prayer for bail vide Criminal Misc. Case No. 365 of 2010.

2. On 23.12.2010 the learned Sessions Judge, Darjeeling vide Order No. 4 passed in Criminal Misc. Case No. 405 of 2010 considered the bail application once again and

duly recorded that the charge sheet had been submitted under sections 302/120B but, at the same time, refused to grant bail to him. These two rejections mentioned earlier were, therefore, made on 02.12.2010 and 23.12.2010, respectively. Thereafter and within 13(thirteen) days, on 05.01.2011, the respondent No. 1 again filed a bail application being Criminal Misc. Case No. 11(1) of 2011 and in that application, paragraphs 3 to 6 are relevant to be noted. They read as follows:

3. That thereafter your petitioner, with the apprehension of his arrest in connection with the above referred case, filed an application for anticipatory bail u/s 438 Cr.P.C. before the Hon"ble High Court at Calcutta and ultimately the Hon"ble Court, by an Order dated 13.9.2010, was pleased to reject the anticipatory bail to your petitioner and your petitioner was directed to surrender before the learned A.C.J.M., Siliguri.
4. That your petitioner, in compliance with the aforesaid Order of the Hon"ble High Court at Calcutta, voluntarily surrendered before the learned A.C.J.M. at Siliguri on 24.9.2010 and prayed for bail, but the learned A.C.J.M., Siliguri, after hearing of both sides, was pleased to reject the bail application and your petitioner was remanded to J/C till 08.10.2010.
5. That in the meantime on 21.12.2010, the Investigation Officer of the case, Sri Swapan Kumar Ghosh, Inspector of Police, DEB, Sadar, Darjeeling, after completion of the investigation, submitted Charge Sheet being No. 497/10 dated 21.12.2010 u/s 302/120B of the IPC against altogether 3 (three) persons including your petitioner.
6. That thereafter on 24.12.2010, your petitioner filed a bail application before the Ld. Court below and the said application was considered and rejected.

(Quoted)

3. Upon a perusal of the aforementioned paragraphs it is evident that the respondent No. 1 mentioned the fact that his anticipatory bail application was rejected by the High Court on 13.9.2010. It is further evident that the respondent no. 1 also disclosed that after rejection, he voluntarily surrendered on 24.9.2010 and prayed for bail before the learned ACJM, Siliguri who however, rejected his prayer for bail on 08.10.2010. The respondent No. 1 has also mentioned that he filed another bail application, which was rejected by the learned Court below and he has stated that this bail application was filed on 24.12.2010. However, this obviously refers to the order of rejection made on 24.12.2010 by the learned ACJM at Siliguri. This would be evident from paragraph 3 of the application filed by this applicant (quoted below) and which was filed before the learned Additional District and Sessions Judge, 1st Court at Siliguri in Criminal Misc. Case No. 31(1)/2011. The certified copy of the said application is on record and paragraph 3 thereof is relevant to be taken into consideration for that purpose. The same reads as follows:
3. That of late the bail prayer on behalf of the accused person was made on 09.12.2010 before the learned District & Sessions Judge, Darjeeling u/s 439 Cr.P.C.

being Crl. Misc. Case No. 405/10. During the pendency of the said application for bail the Investigating Officer submitted the charge sheet on 21.12.2010. However on 23.12.2010 said application for bail was hard and the same was also rejected on the ground of filing of the Charge Sheet within the statutory period of 90 days and for the offence punishable u/s 302/120B I.P.C. as well as considering the facts and circumstances and nature of the case. It is pertinent to mentioned that the accused person's submission for consideration of serious illness and detention in jail custody for 91 days as well as said medical grounds was strongly opposed by the Ld. P.P. there in and the Ld. Court virtually considered all those submissions while rejecting the petition for bail. The bail prayer of the accused person then on 24.12.2010 was also rejected by the Ld. A.C.J.M. at Siliguri.

(Quoted but underlining is by this Court)

4. However, from the paragraphs quoted above we notice that the respondent No. 1 clearly suppressed the fact that his bail applications were twice rejected by the learned Sessions Judge on 02.12.2010 and on 23.12.2010 by the same learned Sessions Judge. On the basis of such suppression, it appears that the Additional Sessions Judge, 1st Court at Siliguri granted bail to the petitioner on 10.01.2011.

5. The application for cancellation of bail was taken up for consideration by Sri Sankar Brahma, Additional Sessions Judge, 1st Court, Siliguri at Darjeeling on 05.4.2011. It appears that the said learned Court completely brushed aside and ignored the specific assertions of the applicant regarding suppression of fact. Considering that the allegations are serious in nature and charges u/s 302/120B have been framed, he ought not to have ignored the same by making a remark that he found no suppression of fact. Therefore, what the applicant asserted was not considered by the Court in its proper perspective. In fact, the Court below had himself recorded the submissions of the applicant while opening, Order No. 8 dated 05.4.2011 but while dealing with the same, he completely misdirected himself by saying that he "did not find any suppression". The opening paragraph and the offending paragraph read as follows:

(A) Petitioner submits that accused Gurdip Singh Saluja was granted with bail by this Court and while bail was moved on behalf of accused then there was suppression of material fact. It was submitted that prior to disposal of the petition u/s 439 Cr.P.C. in favour of accused Gurdip Singh, same accused moved a bail petition before Ld. Sessions Judge and there bail petition of the accused was rejected on the observation given by learned Sessions Judge. Ld. Lawyer submits that on behalf of accused such fact was totally suppressed before this Court while they moved bail prayer in this Court on dt. 05.01.2011. Ld. Lawyer also stated that there was no changed situation before this Court for granting bail in favour of accused just after 13 days to the rejection of earlier prayer before Ld. Sessions Judge. It was submitted that seriousness of the offence and the fact that there was *prima facie* case was not at all considered by this Court at the time of disposal of bail prayer. Ld. Lawyer

referring following decisions prayed for rejection of bail of accused Gurdip Singh Saluja. About notice upon state, it was stated that copy of petition u/s 439(2) Cr.P.C. supplied to State.

2008 S.C.C. (Cri) 660; 2008 (2) S.C.C. (Cri) 428; 2005 (2) SBR 407;

2005 (9) SBR 328; Ajayaraj Vs. State of Kerala, ; Tufail Ahmad Vs. State of U.P. and Others,

2004 (7) SBR 437; 2009 (4) SBR 410; 2006 (1) S.C.C. (Cri) 58.

(Quoted but underlining is by this Court)

(B) Perused prayer for cancellation of bail, written objection thereof and sufficiently heard learned Counsels. No doubt petition for cancellation of bail submitted in proper forum and right of de facto complainant to file bail cancellation prayer also cannot be denied. Accused appearing this Court contested the said prayer of de facto complainant. So far allegation of State is concern, that notice not served cannot be believed as it is seen that the copy of petition of de facto complainant was duly served upon State. In the circumstances it is clear that all sides were informed. Seen L.C.R. and Cr. Misc. Case 11(1)/2011. Normally at the time of considering a petition for bail in non-bailable case we do consider (a) nature of offence and its seriousness (b) character of evidence on which prosecution relies (c) circumstances which are peculiar to the accused (d) reasonable possibility of accused persons absconcence (e) reasonable possibility of accused's tampering with evidence (f) larger interest of public and of the State. But paramount consideration that prevails with us is to see that accused does not outlaw himself to exile himself to make it difficult for the justice being visited upon him. It is presumable that this Court while considered petition u/s 439 Cr.P.C. in favour of the accused then certainly thought all these aspects of law. Now thing has to be seen whether there was suppression of any material fact or not. Regarding allegation of suppression it was contended by present petitioner that prior to filing of this petition, accused's prayer for bail was turned down by learned Sessions Judge. Having heard other side and considering the code of Cr.P.C. I really find no such suppression of fact. It is right of accused that he can file subsequent bail application and forum where he approached and granted with bail is very much within established principles of law and nothing wrong found in the matter of disposal of a petition u/s 439 Cr.P.C. by this Court after the earlier one disposed of by Ld. Sessions Judge.

(Quoted but underlining is by this Court)

6. It is therefore clear that the Court below committed a complete error of record by dismissing the application inasmuch as in the concluding portion of his order, he has stated that "having heard other side and considering the Code of Cr.PC, I really find no such suppression of fact". This Court does not understand as to what the Code of Cr.P.C. has to do with a question of suppression of fact?

7. We are of the view that when the fact relating to rejection of bail by the same Court, not once but twice, was pleaded specifically by the petitioner, it was incumbent upon by the learned Court below to have considered the same in the light of the well known principle that no person can approach a Court of law with unclean hands as suppression of truth indicates suggestion of falsehood. The fact that the bail applications of the petitioner were twice rejected by the same Court, ought to have been specifically pleaded when a third bail application was moved before the same Court in such a serious case irrespective of the fact whether the incumbent on the chair had changed. This, in the opinion of this Court, is not only a misconceived finding but, in our opinion, and if we may say so, a completely mechanical approach to the case.

8. Having approached the Court with unclean hands and having obtained an order of bail on the basis of such suppression in such a serious case, amounts also to an abuse of the processes of the Court. We are, therefore, left with no alternative but to cancel the order of bail granted to the respondent No. 1 by the learned Additional Sessions Judge, 1st Court at Siliguri on 10.01.2011. However, this order of cancellation will not prejudice the case of the respondent No. 1 in the event he desires to move a fresh bail application before the appropriate Court in accordance with law provided he makes out fresh grounds and also provided he approaches the Court with clean hands by disclosing all facts correctly.

Upon appropriate Application(s) being made, urgent Photostat Certified copy of this judgement, be given/issued expeditiously subject to usual terms and conditions.

Dipak Saha Ray, J.

I agree.