

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2785 OF 2009
with
CRIMINAL APPLICATION NO. 425 OF 2010

CRIMINAL WRIT PETITION NO. 2785 OF 2009

1. Ambarish Rangshahi Patnigere,)
Aged 43 years, Occu: Service,)
R/o Abhishek, flat N.101, Plot No.B-72/2,)
Sector N.23, Nerul, Navi Mumbai.)
2. Namdeo Narayan Alhat,)
Aged 53 years, Occu: Business,)
R/o H/1/2/3, Paradise Society, Sector No.7,)
Sanpada, Navi Mumbai.)
3. Divakar Nandkumar Samel,)
Aged 47 years, Occu: Service,)
R/o Madhusmita Plaza,)
MCM Society, Old Panvel Road,)
Navi Mumbai.)
4. Jaywant Parbat Dalvi,)
Aged 51 years, Occu: Service,)
R/o. 11, Twins Heritage,)
Plot No.70, A/B, Sector-19,)
Nerul, Navi Mumbai.)
5. Prakash Laxman Kamble,)
Aged 46 years, Occu: Service,)
R/o 306, Manas C.H.S., Sector 6,)
Airoli, Navi Mumbai.).. Petitioners
(Orig.Accused)

Versus

The State of Maharashtra,)
 Through Sr. P.I., CBD Belapur Police)
 Station, Navi Mumbai.).. Respondent
 (Orig.Complainant)

CRIMINAL APPLICATION NO.425/2010

Mr. Ramakant Mhatre)
 Age: 47 years, Occu: Corporator,)
 R/at : Gothivali, Post Ghansoli,)
 Thane Belapur Road, Navthe Applicant)
 Mumbai.).. Applicant
 (Orig.Intervener)

Versus

1. Mr. Ambarish Rangshahi Patnigere,)
 Aged 43 years, Occu: Service,)
 Dy. - Commissioner, NMMC.)
2. Mr. Divakar Nandkumar samel)
 Age 33 years, Occupation - Service.)
 Assist Commissioner, NMMC.)
3. Mr. Jayawant Parbat Dalvi)
 Age 51, Occupation - Service,)
 Chief Accountant and Finance Officer)
 NMMC.)
4. Mr. Namdeo Narayan Alhat)
 Age: 53, Occupaion - Service.)
 Dy. Commissioner, NMMC.)
5. Mr. Prakash Laxman Kamble,)
 Aged 46 years, Occu: Service,)
 Sr. Accountant - NMMC.)

6. The State of Maharashtra)
(At the instance of CBD Police)
Station, Navthe Applicant Mumbai.)..Respondents
(Nos. 1 to 5 original Opponents
No.6 original Applicant.

Mr. Shirish Gupte, i/b. Mr. J.G.Reddy, Advocates, for the petitioners.

Mr.Manoj J.Bhat,Advocate for the Intervener/Applicant.

Smt. A.A.Mane, APP, for the Respondent - State..

CORAM: J.H.BHATIA,J.

DATE : 22nd July, 2010.

JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard Counsel for the parties.
2. To state in brief, Writ Petition No.2785 of 2009 is filed by the five accused persons in Crime No.I-73/2009, registered with CBD Belapur police Station, Navi Mumbai on 17.5.2009. The petitioners are the senior officers of Municipal Corporation of Navi Mumbai. Petitioner No.1 was the Deputy Municipal Commissioner, petitioner No.2 was the Assistant Municipal Commissioner, petitioner No.3 was the Office Superintendent/Ward Officer and then Assistant Municipal Commissioner, petitioner No.4 was working as Senior Accountant and the petitioner No.5 was the Deputy Accountant and then Assistant Account Officer. On 16.5.2009, Suresh Ramu Patil, Assistant Commissioner of

Navi Mumbai Municipal Corporation filed a report with the Senior Inspector of Police, CBD Belapur Police Station, Belapur, Navi Mumbai. That report revealed that for the purpose of removal of encroachment and for transportation of the goods removed after encroachment, the Municipal Corporation required supply of labourers, instruments, machinery and vehicles. For this purpose, Municipal Corporation had called tenders. H.B. Bhise & Co., of which H.B. Bhise was the proprietor, had submitted tender which was accepted. On 12.5.2009, a meeting of all the concerned officials and the Assistant Commissioners was called by the Deputy Commissioner for the purpose of removal of encroachment and unauthorised construction, to stop new encroachment and for carrying out immediate works during the rainy season. During the meeting, some officers made a grievance that men and machinery and vehicles were not made available by the contractor H.B. Bhise and, therefore, the work of removal of encroachment, unauthorised construction, etc. could not be carried out effectively. It was also pointed out by some of the officers that the contractor was required to submit one copy of the challan showing the work done by him and the bill for that work to the concerned ward officer and one copy in the office for passing the bills, so that the concerned officers of the different areas could verify the correctness of the bill. In view of the complaint that the contractor was not following the procedure and used to submit the bills and challans directly in the office to get them

passed, the Deputy Commissioner became suspicious and, therefore, he called the record for the period from 1.4.2007 to 31.3.2008. Several officers pointed out that either the bills and the challans did not bear their signatures or when they were signed by the officers, there were over-writings and forgery in respect of number of labourers, vehicles and machinery supplied. It appears that in some cases, the signatures of the concerned officers of the different areas were not obtained and in some cases after obtaining their signatures, changes were made in the contents of bills and challans by over-writing for the benefit of the contractor. The said contractor was working for the Navi Mumbai Municipal Corporation since 27.2.2003. On audit of the record for the financial year 2007-08, it was revealed that the bills, worth Rs.53,68,575/- submitted by the contractor H.B.Bhise, were passed and payment was made. However, as per the entries taken in the note books pertaining the work of removal of encroachment the actual work done was worth Rs.17,51,916/-. It did not include the amount of work done for Airoli area. That amount appears to be Rs.6,82,610/-. Excluding that amount and the actual work done as per the record, excess payment of Rs. 26,31,796/- was made to the contractor H.B.Bhise for one financial year. In the report lodged by the police, it was stated that this was the excess payment for one year and as the said contractor was working since February 2003, there was possibility of much more excess payment and defalcations. On the basis of that

report, the offence was registered as Crime No.I-173/2009 for the offences punishable under Sections 420, 465, 467,468, 471 IPC against H.B.Bhise, the proprietor of H.B.Bhise & Co.

3. During investigation, it was revealed that excess payment to the tune of Rs.1,38,03,008/- was made and several persons including staff members of the Municipal Corporation were involved in commission of the said offence and helped the said contractor H.B.Bhise. As per the remand report dated 9.9.2009 submitted by CBD Belapur Police Station before the J.M.F.C. Vashi, Navi Mumbai, besides H.B.Bhise, 7 other persons were already arrested and remanded to Judicial Custody. On 8.9.2009, at 16.30 hrs., 5 more persons, who are the petitioners before the Court, came to be arrested for the said offence. In the remand report, it was submitted that these accused persons were also involved in commission of offence, as some of them were in charge of the concerned areas, the Assistant Municipal Commissioner and some were accountants and the offences are committed by H.B.Bhise in collusion with and active assistance of these petitioners. However, as per the remand report immediately after the arrest each of these five persons, complained of different medical problems and were required to be taken to the Municipal Corporation Hospital at Vashi where they were immediately admitted in the Intensive Care Unit. In the remand report, it

was stated that in view of their admission in ICU in the Hospital, they could not be produced before the Court. Therefore, in absence of those accused persons, the learned Magistrate was requested to grant their judicial custody, but at the same time, the Investigating Officer clearly stated that this application for remand was without prejudice to his right to make an application for police custody remand as and when these accused persons would be found medically fit. In view of this, on 9.9.2009, the learned Magistrate granted Judicial Custody remand of these petitioners till 11.9.2009.

4. When these petitioners were indoor patients in ICU in the Hospital, on 10.9.2009 an application for bail was moved on their behalf by their Advocate. It appears that the application was moved at 2.30 p.m. and the learned Magistrate directed the learned APP to file reply immediately. On that bail application, at 4 p.m., the learned Magistrate endorsed that despite giving directions to the concerned Court duty constable, he was absent till 4 p.m. and that when the matter was called, nobody was present nor affidavit was filed. After that endorsement, the matter was placed on the next day i.e. 11.9.2009. On 11.9.2009 at 11.25 a.m. the Magistrate endorsed on the bail application - "I.O. absent Case diary not produced till 11.25 a.m. At 11.35 a.m., the learned Magistrate endorsed and directed I.O. to remain present with case diary immediately. It appears from

the record that the learned APP had submitted his strong objection to the bail application contending that because of the medical reasons, immediately after arrest, the accused persons were required to be admitted in the Hospital. Magisterial custody remand was sought having reserved a right to seek police custody. The period of 15 days after arrest was not over during which police custody could be sought by police under Sec. 167. Defalcation of huge public money was committed and the accused persons, as public servants, had committed serious offences which included offence under Sec. 467 IPC which is punishable for imprisonment for life and therefore the Magistrate could not grant bail.

5. The learned Magistrate passed the order on the application granting bail. That order reveals that he had started dictation of the order at 11.40 a.m. and completed at 4.30 p.m. He also noted that at 4.30 p.m., the Investigating Officer filed an application for grant of police custody remand on several grounds. However, by that time, the dictation of the order on bail application was completed and though the learned APP and I.O. were present during dictation, I.O. had not moved application for police custody remand nor he had stated that he was moving an application for police custody remand. On the remand report dated 11.9.2009, submitted at about 4.30 p.m., the learned Magistrate passed the brief order rejecting the application. The main ground for rejection of the request

for police custody was that charge-sheet was already filed and in view of the authority of the Bombay High Court in **Mohammed Ahmed Yasin Mansuri vs. State of Maharashtra 1994 (1) Mh.L.J.688**, once charge-sheet is filed and cognizance of the offence is taken, only custody which could be granted is Magisterial custody even in respect of the accused who is arrested during investigation after taking cognizance of the case. The said order does not reveal any other reason for refusal of the police custody. The said order rejecting the application for police custody remand was challenged in Revision Application No.178/2009. That Revision Application was partly allowed by the learned Additional Sessions Judge, Thane by the impugned judgment and order dated 9.10.2005. The learned Additional Sessions Judge observed that while the order granting bail is an interlocutory order and cannot be challenged by filing Revision Application, the order refusing to grant police custody is not an interlocutory order and it can be challenged. The learned Additional Sessions Judge set aside the order passed by the Magistrate refusing to grant police custody and directed the learned magistrate to fix the matter on 12.10.2009 for passing proper order in connection with police custody of the accused for the purpose of further investigation. The said order in the Revision Application setting aside the order of the Magistrate refusing Police Custody has been challenged by the accused/petitioners in the present Petition. The said order is also challenged by

the Intervenor in the Criminal Application No.425/2010. The intervener, was a Corporator and Leader of the Opposition during the relevant period. He also claims to be whistle-blower. He has challenged the order passed by the Additional Sessions Judge refusing to set aside the order granting bail to the accused persons.

6. Before going to the facts and the arguments advanced by the learned Counsel for the parties raising several grounds for and against the grant of bail and refusal of police custody, it may be noted that the learned Magistrate had rejected the request for police custody on the sole ground that in view of the Judgment and authority of this High Court in **Mohammed Yasin Mansuri (supra)**, the police custody remand could not be granted even in respect of the accused who would be arrested for the first time after the charge-sheet was filed and cognizance of the case was taken. The said Judgment of the Division Bench of this Court was over-ruled by the Supreme court in **State through CBI vs. Dawood Ibrahim Kasker & Ors. (2000) 10 SCC 438**. The Supreme Court after having considered the similar arguments as advanced on behalf of the present petitioners and the provisions of sections 167, 173(8) and 309 Cr.P.C. observed thus in paras 10 and 11 :-

"10. In keeping with the provisions of Section 173 (8) and the above-quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance of an offence, to authorise the detention of a person, who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry or trial and sub-section (2) thereof reads as follows :

"309. (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

"11. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation

and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri - to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. we are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of

the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167."

7. From the above observations of the Supreme Court, it is clear that Their Lordships specifically considered the interpretation put by this Court in **Mohd. Yasin Mansuri** and overruled the same. From the above observations, it is clear that words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. Their Lordships made it clear that the accused who would be arrested during further investigation after filing of the charge sheet and taking cognizance of the case would be governed by Section 167 Cr.P.C. so long as further investigation continues subject to limits and requirements of sec. 167. In view of this legal position, the order passed by the Magistrate refusing police custody on the sole ground was clearly wrong and could not be sustained. The manner in which the learned Magistrate dealt with the bail application by making different endorsements thereon minute to minute as noted earlier, it appears that the Magistrate was in great haste and hurry to grant the bail to the accused persons and he did not give sufficient and reasonable

time to the prosecution to oppose that application and to bring the correct legal position before the Court. The learned Magistrate had almost completed dictation of the order on bail application by 4.30 p.m. and at about 4.35 p.m., he rejected the application moved by the Investigating Officer for police custody by passing a short order referring to the authority in **Mohd. Yasin Mansuri**. Had the learned Magistrate given sufficient and reasonable time to the prosecution, the learned Assistant Public Prosecutor could point out to the Magistrate that the said authority of the Bombay High Court was overruled long back in the year 2000 by the Supreme Court. However, because of the haste shown by the learned Magistrate, he rejected the application for police custody remand on the basis of the overruled authority of this Court.

8. The learned Counsel for the petitioners vehemently contended that the order granting or refusing bail or police custody remand is an interlocutory order and therefore such an order is not subject to revisional jurisdiction under Section 397 Cr.P.C. Section 397(2) provides that powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. The question before this Court is whether the order granting bail is or is not interlocutory order and whether the superior Courts can interfere if the bail order is passed without jurisdiction or if it

is passed without application of mind by the concerned Magistrate and without considering the gravity of the matter. Similarly a question also arises whether the refusal to grant police custody remand is interlocutory order and is not subject to revisional jurisdiction of the superior Courts. The learned Counsel for the petitioners vehemently contended that in a catena of judgments, the Supreme Court held that the order granting bail is an interlocutory order and is not subject to revisional jurisdiction. What is interlocutory order within the meaning of Section 397 Cr. P.C. was the subject matter for consideration before the Supreme Court in number of cases beginning with **Madhu Limaye vs. State of Maharashtra AIR 1978 SC 47**, **V.C. Shukla, V.C. Shukla vs. State (1980) SCC 695**, **Usmanbhai Dawoodbhai Memon v. State of Gujarat, 1988 (2) SCC 271**, In **Usmanbhai**, the Supreme Court considered the earlier Judgments and observed thus in para 24 :-

"24.... The expression 'interlocutory order' has been used in Section 19(12) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the federal Court is to

see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In V.C. Shukla v. State, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted in contradistinction to an interlocutory order; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal proceedings, the word 'judgment' is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time...."

9. Thus, in **Usmanbhai**, it was held that the grant or refusal of bail application is essentially an interlocutory order as there is no finality to such an order for an application for bail can always be renewed from time to time. The

Supreme Court dealt with only the question whether the grant of bail was or was not interlocutory order. In **State represented by Inspector of Police vs. N.M.T. Joy Immaculate 2004 (5) SCC 729**, Police custody for one day was granted by the Magistrate and it was held to be interlocutory order and it was held that revision against such an order is not maintainable. However, the question whether refusal of the police custody is final or interlocutory order was not subject matter for consideration. That point came before this Court in **R. Shakuntala vs. Roshanlal Agarwal and others 1985 Cri. L.J. 68** wherein the learned Single Judge of this Court considered the observations in **Amar Nath v. State of Haryana AIR 1977 SC 2185, Madhu Limaye** and other Judgments. The learned Judge observed thus in para 9 :-

"9.... In this connection the Supreme Court had occasion to deal with Amar Nath's case AIR 1977 SC 2185 : (1977 Cri LJ 1891). The Supreme Court observed in that connection as follows :-

"It is neither advisable, nor possible to make a catalogue of orders to determine which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which will fall in between the two."

It will be seen that having regard to this view taken by the Supreme Court, in fact in Madhu Limaye's case AIR 1978 SC 47: (1978 Cri LJ 165), the larger Bench of the Supreme Court has expressed an opinion that the broad statement of law contained in Amar Nath's case needed certain modification. However, the Supreme Court reaffirmed the decision in Amar Nath's case and held that the order releasing some of the accused on perusal of the police report and subsequently summoning them was not an interlocutory order but was a final order. To my mind, reading the two cases together Amar Nath's case and Madhu Limaye's case, no doubt is left about the legal position, namely, that an order rejecting the Department's application for remand of the accused to judicial custody is a final order and not an interlocutory order."

The learned Judge of this Court in **R. Shakuntala**, finally came to conclusion that an order rejecting application for remand of the accused to judicial custody is a final order and not an interlocutory order. This will be applicable with equal force to the refusal of request for police custody also. As such, the order passed by the Magistrate rejecting request for police custody cannot be treated as interlocutory order because the police cannot repeat and make applications again and again for police custody after the application for police custody had been rejected once and particularly in view of the limitation under Sec. 167 Cr.P.C. that the police custody

may be granted only during first 15 days after the arrest or detention and not thereafter. If such application for police custody is rejected, that order becomes final and the Investigating Officer is permanently deprived of seeking police custody of that accused for the purpose of further investigation, discovery, etc. even though the offence may be very serious.

10. Mr.Bhat, learned Counsel for the intervener contended that if the Magistrate has granted bail in the serious offences without looking to the gravity of the offences and without giving proper opportunity to the prosecution to present its viewpoint and if it results in the miscarriage of justice, the superior courts can always interfere and can cancel the bail by virtue of powers under Section 439(2) Cr.P.C. The learned counsel for the intervener placed reliance on several authorities in this respect.

11. In **Puran vs. Rambilas and Anr. 2001 (6) SCC 338**, the Supreme Court observed thus in para 10 :-

"10. Mr. Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of

Dolat Ram v. State of Haryana. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected."

SC 115, the Supreme Court again reiterated the observations made in *Puran vs. Rambilas* and observed thus in paras 8 and 9 :-

"8. In our view, it appears that the High Court has committed basic error in not referring to the provisions of section 439(2) Cr.P.C. which specifically empower the High Court or the court of sessions to cancel such bail. Section 439(2) reads as under :

"439. Special powers of High Court or court of session regarding bail:

(2) A High Court or court of session may direct that any person who had been released on bail under this chapter be arrested and commit him to custody."

*"9. Proviso to section 167 itself clarifies that every person released on bail under section 167(2) shall be deemed to be so released under chapter XXXIII. Therefore, if a person is illegally or erroneously released on bail under section 167(2), his bail can be cancelled by passing appropriate order under section 439(2) Cr.P.C. This Court in *Puran v. Rambilas and Another* [JT 2001 (5) SC 226], has also clarified that the concept of setting aside unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation."*

13. The same principle was reiterated by the Supreme Court in **Subodh Kumar Yadav v. State of Bihar & Anr. AIR 2010 SC 802**. Their Lordships observed thus in para 9 :-

"9. Learned counsel for the appellant contended that cancellation of bail can be only with reference to conduct subsequent to release on bail and the supervening circumstances. According to him an application for cancellation will not be maintainable with reference to what transpired prior to the grant of bail. He relied upon the following observations in State of U.P.vs. Amarmani Tripathi [(2005) 8 SCC 21]: (2005 AIR SCW 4763, Para 18), in support of the said contention :-

"The decisions in Dolat Ram v. State of Haryana [1995 (1) SCC 349]: (2004 AIR SCW 4970) and Samarendranath Bhattacharjee v. State of West Bengal [2004 (11) SCC 165] relate to applications or cancellation of bail and not appeals against orders granting bail. In an application for cancellation, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant under Section 439 read with section 437, continue to be relevant. We, however, agree that while considering and deciding the appeals against grant of bail, where the accused has been at large for a considerable time, the post-bail conduct and supervening circumstances will also have to be taken

note of. But they are not the only factors to be considered as in the case of applications for cancellation of bail."

A careful reading of the said observations shows that while considering the factors relevant for consideration of bail already granted vis-a-vis the factors relevant for rejection of bail, this Court pointed out that for cancellation of bail, conduct subsequent to release on bail and supervening circumstances will be relevant. The said observations were not intended to restrict the power of a superior court to cancel bail in appropriate cases on other grounds. In fact it is now well settled that if a superior court finds that the court granting bail had acted on irrelevant material or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the public prosecutor/complainant where required, an order for cancellation of bail can in fact be made. (See Gajanand Agarwal vs. State of Orissa [2006 (9) SCALE 378] : (2006 AIR SCW 4753) and Rizwan Akbar Hussain Syed v. Mehmood Hussain [2007 (10) SCC 368]: (2007 AIR SCW 3654)."

14. In view of the above authorities of the Supreme Court, it is now settled position of law that even though the grant of bail may be interlocutory order not subject to revisional jurisdiction under sec.397, still the superior Courts

by virtue of the powers under Sec. 439(2) Cr. P.C. can cancel the bail in appropriate cases, if the superior Courts find that the bail was granted acting upon irrelevant material or there was non-application of mind or failure to take note of statutory bar or grant bail, or if there was manifest impropriety as for example failure to hear the public prosecutor or complainant.

15. In **Subodhkumar Yadav (supra)**, facts and the circumstances under which the bail was granted by the Magistrate were almost similar to the present case. After having considered the facts of that case, the Supreme Court observed thus in para 11 :-

"11.....The undue haste exhibited by the learned Magistrate as well as his decision to hear the bail application on the same day without hearing the learned counsel for the complainant, compelled the learned Sessions Judge to draw adverse inferences against the learned Magistrate. On the facts and in the circumstances of the case, this Court is of the opinion that the learned Sessions Judge was justified in drawing adverse inferences against the learned Magistrate and holding that the order granting bail was passed by the learned Judicial Magistrate for considerations other than judicial...."

In the present case also, the learned Magistrate showed a great haste in hearing bail application and passing the order without giving reasonable time and opportunity to the investigating officer and the Public Prosecutor to move application for police custody remand and also to oppose the bail application . As indicated above, if the reasonable opportunity would have been given, the learned Magistrate would have been saved of passing the order rejecting application for police custody on the basis of overruled authority of this Court. The haste shows that the Magistrate was bent upon hearing bail application immediately and i passing order for bail. This amounted to impropriety.

16. The facts of this case are already noted above and it shows that a serious offences of forgery, misappropriation, etc. were committed and huge amount of more than Rs.1,38,00,000/- was paid in excess to the contractor H.B.Bhise. It could not have been possible if the concerned officers would have been careful in verifying the record and taking due caution which was expected from them in such matters. The investigation papers revealed that the contractor had given registration number of vehicls, allegedly used for the purpose of transportation of the goods and material after demolition of the unauthorised structures and removal of the encroachment and those registration numbers were of two wheelers like scooters and bikes. Thus a huge fraud was played against the

Corporation. Not only this, it was revealed that the proper procedure was not followed in presentation of bills because one copy of the bills was not given to the concerned ward officer and the bills were directly submitted before the senior officers who passed the bills without any scrutiny and verification by the concerned ward officers. Some of the bills revealed that even though they were signed by the ward officers, later on, by overwriting the contents of the same were changed in respect of number of workers, machinery and vehicles used and thus forgery was played and on the basis of forged documents, huge excess payments were made to the contractor. This was a loss to the public money because after all the Municipal Corporation was to make payment from the taxes collected from the general public. In view of the manner in which these offences were committed, the investigating officer wanted police custody of these petitioners for proper investigation which could go to the root of the case. That opportunity was refused by the learned Magistrate and he hastily granted bail to them.

17. It may be noted here that the learned Counsel for intervener contended that the Magistrate did not have jurisdiction to grant bail because the offences under Sections 467 and 409 IPC, carry punishment which may be life imprisonment. According to the learned Counsel, if the offence is punishable with

sentence of death or life imprisonment, the Magistrate cannot grant bail under Section 437(1) Cr. P.C. unless there are special grounds mentioned therein. He relied upon certain authorities in this respect including **Prahlad Sigh Bhati vs. NCT, Delhi & Anr. JT 2001 (4) SCC 116**. In that case, offence was under Section 302 which is punishable with death sentence or life imprisonment and is exclusively triable by Court of Sessions. The offence under Section 409 is punishable with imprisonment for life or imprisonment for 10 years and fine. Similarly, the offence under Section 467 is also punishable with imprisonment for life or imprisonment for 10 years and fine. Even though the maximum sentence which may be awarded is life imprisonment, as per Part I of Schedule annexed to Cr.P.C., both these offences are triable by a Magistrate of First Class. It appears that there are several offences including under sec.326 in the Indian Penal Code wherein sentence, which may be awarded, is imprisonment for life or imprisonment for lesser terms and such offences are triable by Magistrate of the First Class. If the Magistrate is empowered to try the case and pass judgment and order of conviction or acquittal, it is difficult to understand why he cannot pass order granting bail, which is interlocutory in nature, in such cases. In fact, the restriction under Sec. 437(1) Cr. P.C. is in respect of those offences which are punishable with alternative sentence of death or life imprisonment. If the offence is punishable with life imprisonment or any other lesser sentence and is triable by

Magistrate, it cannot be said that Magistrate does not have jurisdiction to consider the bail application. In taking this view, I am supported by the old Judgment of **Nagpur Judicial Commissioner's Court in Tularam & Ors. vs. Emperor 27 Cri.L.J. 1926 page 1063** and also by the Judgment of the Kerala High Court in **Satyan Vs. State 1981 Cr.L.J. 1313**. In **Satyan**, the Kerala High Court considered several earlier Judgments and observed thus in paras 7 and 8 :-

"7. According to the learned Magistrate Section 437(1) does not empower him to release a person on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or an offence punishable with imprisonment for life. In other words the learned Magistrate has interpreted the expression "offence punishable with death or imprisonment for life" in Section 437(1) to include all offences where the punishment extends to imprisonment for life. This reasoning, no doubt, is seen adopted in an old Rangoon Case H.M. Boudville v. Emperor, AIR 1925 Rang 129 : (1925) 26 Cri LJ 427 while interpreting the phrase "an offence punishable with death or transportation for life" in Section 497 Cr. P.C. 1898. But that case was dissented from in Mahammed Eusoof v. Emperor, AIR 1926 Rang 51: (1926) 27 Cri LJ 401). The Rangoon High Court held that the prohibition against granting bail is confined to cases where the sentence is either death or alternative

transportation for life. In other words, what the Court held was that the phrase "death or transportation for life" in Section 497 of the old Code did not extend to offences punishable with transportation for life only, it will be interesting to note the following passage from the above judgement :

"It is difficult to see what principle, other than pure empiricism should distinguish offences punishable with transportation for life from offences punishable with long terms of imprisonment; why, for instance, the detenu accused of lurking house trespass with a view to commit theft, for which the punishment is fourteen years imprisonment, should be specially favoured as against the individual who has dishonestly received stolen property, knowing that it was obtained by dacoity, for which the punishment happens to be transportation for life ? It cannot seriously be argued that the comparatively slight difference in decree of possible punishment will render it morally less likely that the person arrested will put in an appearance in the one case rather than the other. On the other hand the degree of difference is so great as between transportation for life and death as to be immeasurable. A prudent Legislature will, therefore, withdraw from the discretion of the Magistracy cases in which, if guilt is probable, even a man of the greatest fortitude may be willing to pay a material price, however, exorbitant, for life."

The above decision has been followed by the Nagpur High Court in the case reported in *Tularam v. Emperor*, AIR 1927 Nag 53 : (1926) 27 Cr. LJ 1063).

"8. The reasoning applies with equal force in

interpreting the phrase "offence punishable with death or imprisonment for life" So long as an offence under section 326 is triable by a Magistrate of the First Class there is no reason why it should be viewed differently in the matter of granting bail from an offence under Section 420 I.P.C. for which the punishment extends imprisonment for 7 years or any other non-bailable offence for which the punishment is a term of imprisonment."

It would be illogical and incomprehensible to say that the magistrate who can hold the trial and pass judgment of acquittal or conviction for the offences punishable with sentence of life imprisonment or lesser term of imprisonment, for example in offences under S. 326, 409, 467, etc., cannot consider the application for bail in such offences. In fact, it appears that the restriction under Sec. 437(1) (a) is applicable only to those cases which are punishable with death sentence or life imprisonment as alternative sentence. It may be noted that in **Prahlad Sigh Bhati (supra)**, in para 6, the Supreme Court held that even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of session, yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail. This may be applicable to many cases, wherein the sentence, which

may be awarded, is not even life imprisonment, but the offence is exclusively triable by court of Sessions for example offences punishable under Sections 306, 308, 314,315, 316,399, 400 and 450. Taking into consideration the legal position, I do not find any substance in the contention of Mr.Bhatt, learned Counsel for the intervener that merely because the offence is under Sec. 409 and 467 IPC, Magistrate did not have jurisdiction to hear and grant the bail.

18. Even though I find that the learned Magistrate had jurisdiction to consider the bail application and to grant bail,still taking into consideration seriousness and gravity of the matter, it was highly improper on the part of the learned Magistrate to show such haste in considering the application immediately and making endorsements on the bail application minute to minute and refusing reasonable opportunity to the investigating agency to oppose that application, I find that the order passed by the Magistrate granting bail was without application of mind to the facts of the case. By granting bail and refusing police custody of the accused, who were not in police custody even for a day, the learned Magistrate practically prohibited the investigating agency from making proper investigation to the case which, in fact, required in-depth investigation and which could not be possible without the police custody. Therefore, while the order refusing the police custody could be challenged under revisional jurisdiction under sec. 397,

the order granting bail could be cancelled by the superior courts, including the Sessions Court, by virtue of the powers under sec. 439(2) Cr.P.C.

19. The learned Counsel for the petitioners contended that during pendency of the present petition, the petitioners had offered to present themselves before the police for giving their specimen handwritings and signatures and that as per order of this Court they had also made available to police and their specimen handwritings and signatures were obtained by the police and therefore in view of this changed circumstances, now the police custody should not be granted nor bail order passed by the Magistrate should be cancelled. I am not impressed with this contention. The investigation in such a serious offence including huge amount of the Municipal Corporation, which is public money, could not be completed merely by obtaining specimen signatures or handwritings of the accused/petitioners. The investigation would require in-depth interrogation, which could reveal several facts which may not be within the knowledge of the investigating agency without such interrogation,

20. For the aforesaid reasons -

(a) the Writ Petition filed by the petitioners is hereby dismissed. Rule

discharged.

- (b) Criminal Application No.425/2010 filed by the intervener is allowed and the bail granted by the Magistrate is also hereby set aside.
- (c) The petitioners/accused shall remain present before the Judicial Magistrate, First Class, Vashi, Navi Mumbai, on 2.8.2010 and on that day, request for police custody made by the investigating officer shall be considered. The magistrate shall pass appropriate order after hearing both parties.
- (d) It is made clear that in case police custody is granted, after expiry of the police custody remand, the accused/petitioners shall be at liberty to move fresh application for bail and that will be disposed of in accordance with law after hearing both parties. Rule made absolute in the Criminal Application No.425/2010.

(J.H.BHATIA,J.)