

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ON THE 11th OF MAY, 2022

MISC. CRIMINAL CASE No. 21851 of 2022

Between:-

**SHIVAM SHARMA S/O MUKESH SHARMA ,
AGED ABOUT 19 YEARS, OCCUPATION:
STUDENT GANDHI COLONY MORENA
(MADHYA PRADESH)**

.....PETITIONER

(BY SHRI SAMEEER KUMAR SHRIVASTAVA-ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH
INCHARGE POLICE STATION P.S. KOTWALI
(MADHYA PRADESH)**
- 2. KAPIL TOMAR S/O SHRI SANTOSH TOMAR
NEW AAMPURA MORENA (MADHYA
PRADESH)**

.....RESPONDENTS

**(BY SHRI B.M.SHRIVASTAVA- PUBLIC PROSECUTOR-
RESPONDENT NO. 1/STATE AND BY SHRI RAJMANI BANSAL-
ADVOCATE FOR RESPONDENT NO. 2/COMPLAINANT)**

.....
*This application coming on for ADMISSION this day, the court
passed the following:*

ORDER

This is a petition under Section 482 of Cr.P.C. at the instance of petitioner/accused for recalling of order dated 14/3/2022 passed in M.Cr.C.No. 1371/2022, which was an application for cancellation of bail at the instance of respondent No. 2/complainant and same was allowed and bail earlier granted to petitioner vide order dated 18/12/2020 in

M.Cr.C.No. 50455/2020 was recalled and bail was cancelled.

It is the submission of learned counsel for the petitioner/accused that a case was registered against him at the instance of respondent No. 2/complainant for offence under Section 307 of IPC vide crime No. 1046/2020 registered at Police Station City Kotwali, District Morena. He preferred bail application and same was allowed vide order dated 18/12/2020 in M.Cr.C.No. 50455/2020. He enjoyed the personal liberty and according to him, he did not commit any offence but complainant lodged complaint on false pretext against him and two complaints after release of petitioner on bail was registered, one was primarily for offence under Section 336 read with Section 195-A of IPC (Crime No. 1408/2021) and another was for offence under Section 336 of IPC (Crime No. 1422/2021). On this pretext, respondent No. 2/complainant filed an application for cancellation of bail under Section 439 (2) of Cr.P.C. vide M.Cr.C. No. 1371/2022.

In said application for cancellation of bail, registered AD was issued to present petitioner and Govt. counsel was directed to intimate the petitioner about the pending application.

It is the submission of learned counsel for the petitioner that registered AD so issued by office of this Court never reached to petitioner because endorsement over the envelop and AD indicates that address was incomplete and therefore, petitioner could not be served. Even otherwise, if deemed service clause is applied even then it does not make the case of deemed service because as per Chapter XV Rule 11 of High Court Rules,

2008 deemed service provision is applicable for writ petitions and case of petitioner is governed by Section 64 of Cr.P.C. wherein, procedure for service of summons is prescribed.

It is further submitted that para 5 of order dated 14/3/2022 in M.Cr.C.No. 1371/2022 indicates that police authorities given intimation of pending application for cancellation of bail to wife of petitioner but he specifically submits that he is a bachelor and not entered into wedlock so far, therefore, no question of service of notice to his wife arises. Even otherwise, Section 64 of Cr.P.C. contemplates service of summons to an adult male member of family. Therefore, on this count also, service of summons is bad in law.

Learned counsel for the petitioner further referred the judgment of Apex Court in the case of **Vishnu Agarwal Vs. State of Uttar Pradesh and Anr., (2011) 14 SCC 813** to bring home the legal position that in a case where a person is not served and any order is passed while exercising criminal jurisdiction then bar of Section 362 of Cr.P.C. does not come into play to the detriment of that person because according to Apex Court Section 362 Cr.P.C. cannot be considered in a rigid and overtechnical manner to defeat the ends of justice. Therefore, the order can be recalled on this pretext. He also relied upon decision of Apex Court in the matter of **Asit Kumar Kar Vs. State of West Bengal, (2009) 2 SCC 703**.

Learned counsel for the State narrated the course of events and submits that facts as surfaced in case diary were presented before the Court.

Learned counsel for respondent No. 2/complainant opposed the prayer and submits that despite opportunities given to the petitioner/accused, he did not turn up before this Court for assistance and since he was served by way of deemed service through registered AD, therefore, no case for interference is made out. He prayed for dismissal of the petition.

Heard.

This is a case where, petitioner as accused is appearing before this Court under extraordinary jurisdiction under Section 482 of Cr.P.C. for recalling of order dated 14/3/2022 which was being passed by this Court in absence of petitioner (respondent No. 2 therein); whereby, bail earlier granted to petitioner vide order dated 18/12/2020 in M.Cr.C.No. 50455/2020 has been recalled. Perusal of order dated 14/3/2022 reveals that in para 5 facts regarding service of petitioner are being referred. It appears that registered AD was sent for service of petitioner and thereafter, police authorities were directed to intimate the petitioner about pending application for cancellation of bail.

Perusal of "C" part of office file of M.Cr.C.NO. 1371/2022 reveals that an endorsement has been made over the envelope /registered AD in which due to incorrect address notice could not be served and concerned Postman asked the authorities to provide house number for service of notice. Therefore, as per Chapter XV Rule 11 of High Court Rules, 2008 it cannot be treated as deemed service although counsel for petitioner appears to be right when he makes the argument that Chapter XV Rule 11

of High Court Rules, 2008 is in respect of service of summons issued in writ jurisdiction because of original nature of litigation and summons / notice in other cases arising out of Court proceedings of District Court are to be served through the mechanism provided in Civil Procedure Code, Criminal Procedure Code, Civil Court Manual or Criminal Court Manual as the case may be and here Section 64 of Cr.P.C. appears to be the proper mode for service of any person/accused in which it is to be served over adult male member of the family and here it is the specific submission of counsel for petitioner that petitioner is not married yet therefore, factum of service service of summons to his wife appears to be misplaced.

Considering the mandate of Apex Court in the case of **Vishnu Agarwal (supra)**, it is apparently clear that if any party intends to seek recalling of order earlier passed by this Court in criminal jurisdiction on pretext of non-opportunity of hearing then bar created under Section 362 of Cr.P.C. does not come. (See:- **Vishnu Agarwal Vs. State of Uttar Pradesh and Anr., (2011) 14 SCC 813 & Asit Kumar Kar Vs. State of West Bengal, (2009) 2 SCC 703**).

So far as, submission of complainant's counsel regarding service that summons were served over wife of petitioner and same needs to be verified again from concerned police officers/Investigating Officer, is apparently misplaced because in order dated 14/3/2022 service over his wife has been mentioned and sanctity of proceedings cannot be put to doubt as held by Apex Court in the case of **State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr., AIR 1982 SC 1249**.

Considering the over all facts and circumstances of the case, it

appears that petitioner was not duly served at the time of hearing of application for cancellation of bail and since his own personal liberty was involved therefore, it was more imperative that he should have been given a chance to canvass his case.

Resultantly, petition is allowed and order dated 14/3/2022 passed in M.Cr.C.No. 1371/2022 is hereby recalled and M.Cr.C.No. 1371/2022 is restored to its original number.

Let a copy of this order be placed in record of M.Cr.C.No. 1371/2022.

At this stage, learned counsel for the parties fairly submits that they intend to argue the matter finally on any date fixed by the Court and counsel for petitioner/accused undertakes to appear in M.Cr.C.No. 1371/2022 on behalf of then respondent No. 2/accused.

After restoration of M.Cr.C.No. 1371/2022, matter be placed for hearing **day after tomorrow (13/05/2022.)**

(ANAND PATHAK)
JUDGE

JPS/-