S.K. Gandhi vs State Of Gujarat on 7 January, 1997

Equivalent citations: (1997)1GLR434

Author: N.N. Mathur

Bench: N.N. Mathur

JUDGMENT

N.N. Mathur, J.

1. I have heard Mr. B.S. Patel, learned Advocate for the petitioners. Mr. Patel has argued the matter at great length. In support of his contention, he has read before me paras 6, 8 and 9 of the judgment of the Apex Court in the case of Niranjan Singh v. Prabhakar . After having sensed the mood of the Court, the learned Advocate for the petitioners submits that he may be permitted to withdraw this Criminal Revision Application with a view to approach the learned Sessions Judge. Such sort of withdrawal has been deprecated by the Supreme Court in the case of State of Maharashtra v. I.P. Kalpatri . In view of this, I decline permission to withdraw this Criminal Revision Application.

2. This Criminal Revision Application has been directed against the order of the learned Addl. Sessions Judge, Vadodara dated 4-1-1997 passed in Misc. Criminal Application No. 1375 of 1996. The petitioners have prayed for following reliefs:

> (a) Your Lordship may be pleased to call for Record and Proceedings of Misc. Criminal Application No. 1375 of 1996 from the Court of Addl. Sessions Judge (Shri B.D. Ghasura), Baroda, and after perusing the legality and propriety of the order passed on 4-1-1997 at Annexure-E be pleased to quash and set aside.
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> (b) During the admission and pendency of the Revision Application, Your Lordship may be pleased to restrain the concerned police officers of Gorwa Police Station from arresting the petitioners in connection with the Misc. Criminal Case No. I. 295 of 1996 of Gorwa Police Station, at Annexure-A to the petition.

It appears that the petitioners are accused in Criminal Case No. 295 of 1996 registered at Police Station, Gorwa, Baroda for offences under Sections 406, 420, 467, 468 and 471 read with Section 120-B of Indian Penal Code. The said C.R. case is said to have been registered on 28-12-1996. It is alleged that as per the agreement made between the company of the complainant and accused persons, the Hire Purchase Loan of Rs. 3,302,047/- was taken for purchasing four wind-mills out of which only two wind-mills were purchased and instead of returning Rs. 180,96,000/-, of remaining two wind-mills, the same was used in another way and created false certificate that four wind-mills

are installed and used the money of I.T.C. Company in other way and committed breach of trust and fraud and made false record and made a conspiracy with intention to commit the offence.

3. Before the said F.I.R. was lodged, the petitioners directly approached this Court by way of an application for Anticipatory Bail under Section 438 of the Code of Criminal Procedure which was registered as Misc. Criminal Application No. 6197 of 1996. this Court (Coram: D.G. Karia, J.) passed the order dated 20-12-1996, which reads as under:

> Rule. Mr. S.A. Pandya, learned Addl. Public Prosecutor, waives service of Rule for the respondent. In the facts of the case, the matter is finally heard today.
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> The petitioners have prayed for anticipatory bail under Section 438 of the Code of Criminal Procedure in respect of a proposed complaint that may be filed against them on behalf of I.T.C. Classic Finance Limited for the offences either under Section 406 or 420 read with Section 114 of the Indian Penal Code. According to the petitioners, they have been so threatened as regards filing of the complaint by Mr. R. Handa, General Manager of I.T.C. Classic Finance Limited. Mr. R. Handa is not a party in this application. In absence of any complaint lodged as yet, it is difficult to appreciate as to what would be the allegations or averments in the proposed complaint. Under the circumstances, the petitioners shall not be arrested in respect of the complaint for the offences under Section 406 or 420 read with Section 114 of the Indian Penal Code, to be filed by or on behalf of I.T.C. Classic Finance Limited, Bombay/Ahmedabad, against them, till 5-1-1997. Mr. B.S. Patel, learned Advocate appearing for the petitioners states that he will file necessary application for regular bail in the appropriate Court, in the event of lodging the complaint against the petitioners or any of them on behalf of I.T.C. Classic Finance Ltd.
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> With the above direction, Rule is discharged. Direct Service permitted.
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> The petitioners thereafter filed a bail application under Section 439 before the learned Addl. Sessions Judge, Baroda, which was rejected by the impugned order dated 4-1-1997 on the ground that the application under Section 439 is not maintainable as the petitioners are neither in custody nor have they surrendered. The learned Advocate appearing for the petitioners relying on a decision of the Apex Court in Niranjan Singh's case (supra), tried to persuade the learned Judge that the petitioners should be deemed to be in judicial custody in view of the order of the High Court passed in Misc. Criminal Application No. 6197 of 1996. The learned Judge, after discussing the judgment of the Supreme Court, rejected the contention and dismissed the bail application as premature.

4. Mr. B.S. Patel, learned Advocate has assailed the order of the learned Addl. Sessions Judge, mainly on the following grounds:

xxx xxx xxx (3) The order passed by the learned Addl. Sessions Judge dismissing the bail application amounts to an order without jurisdiction as once the learned Sessions Judge has admitted bail application, it cannot be refused to be decided on merits on the ground of premature. Hence, the order passed by the learned Addl. Sessions Judge is totally without jurisdiction.

xxx xxx xxx (6) The learned Addl. Sessions Judge ought to have called the petitioner in the Court if at all his presence was necessary before the Court but instead of going through such exercise, the rejection of the bail application has resulted into serious miscarriage of justice.

(7) The learned Addl. Sessions Judge has erred in not properly considering the order passed by the Hon'ble Court (Coram: Mr. D.G. Karia, J.) Annexure "C" to this petition.

xxx xxx xxx (12) That the learned Addl. Sessions Judge has erred in coming to the conclusion that the petitioners cannot be said to be under any custody as provided under Section 439 of Cri. P.C. xxx xxx xxx As far as the order of this Court dated 20-12-1996 is concerned, learned Advocate Mr. B.S. Patel also agrees that it is not an order of anticipatory bail under Section 438 of the Cr. P.C. It is held by the Apex Court in a leading case on anticipatory bail, in Gurbaksh Singh v. State , that the filing of the F.I.R. is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if F.I.R. is not yet filed. However, the provisions of anticipatory bail cannot be invoked on the basis of vague and general allegations. It does not arm oneself in perpetuity against a possible arrest. Sub-section (1) of Section 438 empowers the High Court or the Court of Session to direct to release the applicant on bail in the event of arrest. There has to be order for bail. A person can be said to be in constructive custody only after he executes a bail bond as directed by the Court under Section 438(1) of the Cr. P.C. In the present case, this Court impressed with the emotional submissions that the marriage of the petitioner No. 1 and marriage of the sister of petitioner No. 2 was fixed in the last month of December, 1996, on humanitarian ground, provided protection for a limited period upto 5-1-1997. It is unfortunate that indulgence given by this Court on humanitarian ground has been sought to be misused. After the F.I.R. was filed, the petitioner could have moved before the Sessions Judge either under Section 438 or 439. In case of application under Section 438, the Court would have considered the matter on merits after notice to Public Prosecutor. The petitioners could have filed application under Section 439 after they had surrendered or arrested after 5-1-1997. Anticipatory bail is a pre-arrest bail and regular bail under Section 439 is a post-arrest bail. The petitioners perhaps apprehending that in the facts of the case involving fraud above a crore of Rupees, anticipatory bail or even regular bail may not be granted evolved a strategy to obtain a smooth order under Section 439, without surrender or arrest, by using the order of this Court by impressing upon the learned Addl. Sessions Judge that the order of the High Court is an order of anticipatory bail and as such the petitioners are in judicial custody in view of the decisions of the Supreme Court in Niranjan Singh's case (supra). However, the petitioners failed in this attempt. The learned Additional Sessions Judge discussed the judgment of the Apex Court in Niranjan Singh's case (supra). After extracting the ratio in Niranjan Singh's case (supra) as follows, rejected the application on the ground that the application under Section 439 was premature:

> No person accused of an offence can move the Court for bail under Section 439 unless he is in custody.
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> Where the accused had appeared and surrendered before the Sessions Judge, the Judge would have jurisdiction to consider the bail application as the accused would be considered to have been in custody within the meaning of Section 439, is physical control or at least coupled with submission to the jurisdiction and orders of the Court. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

5. In Spite of the clear ruling of the Apex Court that unless a person is in custody, he cannot move application under Section 439 and the accused who had appeared and surrendered before the Sessions Judge, shall be considered in custody within the meaning of Section 439, the learned Advocate for the petitioners Mr. B. Section Patel, very emphatically argued that the learned Judge in disregard of the law laid down by the Apex Court on the question of custody has erroneously rejected the bail application under Section 439 as premature. He submitted that if learned Judge so desired, he could have asked for the surrender of the petitioners. The contention deserves to be outrightly rejected.

6. In Niranjan Singh's case (supra), on a private complaint, the learned Magistrate, after enquiry under Section 202 of the Cr. P.C. proceeded against the accused persons who were Police Officers for offences under Section 302 of the I.P.C. The Court issued non-bailable warrants for production. The accused persons without surrender applied for bail, which was rejected. However, the learned Magistrate stayed his own order to move to the Sessions Court. The Apex Court disapproved the course adopted by the learned Magistrate but a serious view was not taken for the reason that the accused persons surrendered before the Sessions Court. The Court further held that only on surrender of the accused persons, Sessions Court acquires the jurisdiction to consider the bail application. The Court also held that a person can be in custody not merely when the Police arrests him, produces him before the Magistrate and gets remand to judicial custody, he can also be stated to be in judicial custody when he surrenders before the Court and submits to its directions. Thus, the Court will have no jurisdiction to hear a bail application for release unless the accused-applicant is in custody on being arrested or on surrender. Simply because an application for bail has been admitted the accused-applicant cannot ask the Court to decide the application for bail on merits. On surrender of accused, the Court in exercise of the judicial discretion, may adopt any of the following courses:

> (1) remand him to appropriate custody.
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> (2) direct to produce the accused persons before the Magistrate having jurisdiction, for consideration of Police/Judicial remand.

(3) to consider the bail application on merits, and either to accept or reject. In case of rejection to remand to custody.

7. The accused, applying for bail for release cannot be permitted to take chance that if the bail is granted, well and good and if not granted, may walk out of the Court and approach the Higher Court. Such a course amounts to circumventing the provisions of Section 439 and has been disapproved by the Apex Court in Niranjan Singh's case (supra). All the Courts taking up application for bail for release must first ensure that the accused is in custody. It is not for the Court to express the desire that the applicant should surrender. The contention raised in the present case that if the learned Addl. Sessions Judge wanted that applicants should surrender, he could have asked to do so, is nothing but an attempt to over-reach the Court. If the applicants desired that their application should be considered under Section 439, it was for them to surrender and submit to its direction, without expecting any invitation from the Court.

8. In the instant case, applicants have made an attempt to misuse the indulgence given by this Court by order dated 20-12-1996, given on humanitarian grounds, which is a prohibitive order not to arrest till 5-1-1997, and not an order of anticipatory bail under Section 438 of the Cr. P.C. The applications through their Advocate have deliberately tried to misread the judgment of the Apex Court not only before the Addl. Sessions Judge, but also before this Court. Thus, the adventure fails. The impugned order of the learned Addl. Sessions Judge being perfectly legal and valid is upheld. It will be open for the applicants to move the Court of Sessions Judge of competent jurisdiction under Section 438 or 439 of the Cr. P.C. The Court shall decide the applications on merit without being influenced by any observations made in this order or in the order dated 20-12-1996. However, the petitioners are not permitted to directly move this Court under Section 438 or 439 of the Cr. P.C. in view of the ratio laid down by this Court in a decision taken in the case of Harivallabh Parikh v. State of Gujarat 1997(1) GLR 638, decided on June 17, 1996.

9. The narration of the facts clearly reveals that the petitioners who claim themselves to be the industrialists are guilty of abusing the process of this Court and therefore, though in criminal cases normally the parties are not saddled with cost, the present one is a fit case to make exception.

10. Thus, the frivolous Criminal Revision Application is dismissed with cost which is assessed as Rs. 5,000/- payable by each of the petitioner. Copy of this order be sent immediately to the Court of Sessions Judge, Baroda.