

IN THE HIGH COURT OF DELHI AT NEW DELHI

BAIL APPLN. 2042/2008

ROOP CHAND BAJAJ Petitioner
Through: Mr. Aman Lekhi, Senior Advocate
with Mr. Jaspreet S. Rai, Advocate.

versus

STATE Respondent
Through: Mr. Sunil Mittal, Advocate.
Mr. Pawan Behl, APP for State.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the order? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

ORDER
15.01.2009

1. This is a petition seeking regular bail in FIR No. 366 of 2007 under Sections 420,467,468,471 read with 34 IPC registered at Police Station Kalkaji. The complainant and the Petitioner accused are real brothers. The Petitioner is one year younger than the complainant.

2. Two facts which are not in dispute need to be stated at the outset. The Petitioner had already undergone six months' of judicial custody. Further, the charge sheet in the case has already been filed on 1st July 2008.

3. Keeping in view the fact that the complainant and the Petitioner

are real brothers, an attempt was made by the parties to settle their disputes and in that context the following order was passed in this Court on 31st October 2008.

“After some arguments, Mr. Sunil Mittal concedes that the petitioner be granted interim bail in order to enable this court to explore the possibility of a comprehensive settlement between the petitioner and the complainant. In this view of the matter, pending disposal of the present application, which is for regular bail, the petitioner shall be released on interim bail on his furnishing personal bond in the sum of Rs.20,000/- and one surety in the like amount to the satisfaction of the trial court. The petitioner shall remain on interim bail for a period of one month from the date of his release. During this period, he shall not leave Delhi without the permission of the court.

It is made clear that the grant of interim bail shall not in any way affect the merits of the case of the petitioner or of the complainant/State.

The petitioner and the complainant shall remain present in court on the next date.

List on November 24, 2008.

Dasti.”

4. The Court was informed on the subsequent date i.e. 24th November 2008 that the attempt at arriving a settlement had failed. In that context the bail application was directed to be heard and the interim

bail was extended.

5. Mr. Lekhi, learned Senior counsel appearing for the Petitioner submits that the Petitioner has during the pendency of the present petition undergone a heart surgery and has been convalescing. He submits that when the charge sheet has already been filed there is no question of Petitioner interfering with the investigation. Given the age of the Petitioner, the nature of the allegations and the fact that he has already undergone six months' of judicial custody there is, according to him, no justification in denying regular bail to the Petitioner.

6. Mr. Behl, learned APP for the State however opposes the grant of bail. He refers to the judgment of the Supreme Court in ***Sunita Devi v. State of Bihar AIR 2005 SC 498 and Naresh Kumar Yadav v. Ravindra Kumar AIR 2008 SC 218*** to urge that the Petitioner should first surrender and be “in custody” at the time of the court granting him regular bail. It is submitted that without this condition being satisfied the Petitioner cannot seek regular bail.

7. Mr. Sunil Mittal, learned counsel for the complainant has also been heard at length. Apart from reiterating the aforementioned objection to the grant of regular bail he submits that the grant of regular bail should not come in the way of the parties exploring the possibility of a settlement. He states that the bank accounts of the Petitioner should be attached pending the trial and that some

directions should be given concerning the absconding accused Rajesh Bajaj. He further submits that the grant of bail to the accused petitioner in the present case should not create a precedence for other co-accused.

8. This Court will first deal with the technical objection raised by learned APP for the State on the strength of the judgment in *Sunita Devi*. It is seen from the said judgment that the Supreme Court first referred to the earlier decision in *Niranjan Singh v. Prabhakar Rajaram Kharote AIR 1980 SC 785* and observed in para 14 (of *Sunita Devi*) that “in view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh v. Prabhakar Rajaram Kharote*, there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable.”

9. It is seen from the judgment of the Supreme Court in *Niranjan Singh* that the said judgment was given in the context of an application for regular bail and the Supreme Court explained what was meant by accused having to be in judicial custody. The observations in para 8 and 9 of the said judgment which are relevant in the present context read as under:

“Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

9. 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. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section [439](#) Cr.P.C. We might have taken a serious view of such a course, indifferent to mandatory provisions by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article [136](#), do not feel that we should interfere with a discretion exercised by the two courts below.”

10. It is clear from the above directions that an accused can be said to be in judicial custody “when he surrenders before the Court and

submit to its directions.” Reverting to the decision in *Sunita Devi* the Supreme Court further expanded on the aforementioned judgment in *Niranjan Singh* and held as under:

“15. The crucial question is when a person is in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold to an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

16. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in setting in which it is used and the provisions contained in Section 437 which relates to jurisdiction of the Magistrate to release an accused on bail under certain circumstances

which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.”

The subsequent decision in *Naresh Kumar Yadav* reiterated the above position in law.

11. As far as the present case is concerned there can be no manner of doubt that the requirement of the accused having to surrender to the Court would, in the context of Section 439, included the High Court as well. Where the interim bail has been granted by the High Court pending consideration of the regular bail, no doubt the High Court would have to ensure that the accused surrenders before his prayer for a regular bail can be entertained. It is clear from the reading of Section 438 that an application for regular bail could be made as much to the High Court as to the subordinate court and there is nothing in the judgments referred to hereinabove which indicate that the surrender by the accused can be only to the subordinate court and not to the High Court before which the main application for

regular bail is pending consideration. As observed in *Niranjan Singh*, the present proceedings concern the grant of regular bail and not anticipatory bail. The order dated 31st October 2008 granting interim bail was passed in an application for regular bail which was filed at a time when the Petitioner was still in custody.

12. The Petitioner is present in Court. He has been identified not only by his counsel but by the IO. The requirement of the law that the Petitioner should surrender to the Court before regular bail can be granted to him, therefore, stands satisfied. The technical objection is therefore rejected.

13. As regards the merits of the case, given the fact that the charge sheet has already been filed and the Petitioner has already undergone six months' pre-trial custody, this Court is satisfied that a case has been made out by the Petitioner for grant of bail. Further, Mr. Lekhi, learned Senior counsel for the Petitioner on instructions states that the Petitioner is still willing to explore the possibility of settlement in future as well as long as the failure to arrive at a settlement is not used as a ground to seek cancellation of the bail. Mr. Sunil Mittal for the complainant adds that the complainant will not use the failure to arrive at a settlement as a ground to seek cancellation and that he would also advise his client to further explore the possibility of a settlement. Both counsel assure the Court that the parties being real brothers, a genuine attempt will be made to solve the disputes amicably.

14. In the facts and circumstances, it is directed that the Petitioner be released on bail on the same terms and conditions on which the interim bail was granted by the order dated 31st October 2008 to the satisfaction of the trial court. The Petitioner will appear before the trial court and a formal order will be passed by the trial court in terms of today's order. The Petitioner will appear before the trial court on every date the case is listed there and will not seek any unnecessary adjournment. He will ensure that the fair progress of the trial is not impeded in any manner whatsoever. He shall not leave India without the permission of the trial court.

15. The petition is disposed of.

16. A copy of this order be given dasti to learned counsel for the parties.

S. MURALIDHAR, J.

JANUARY 15, 2009
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