

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) No. 481 OF 2016

(Dinesh Laxminarayan Bhutada Vs. The State of Maharashtra)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri Rizwan Merchant, Adv. with Shri Abdul Subhan, Advocate
for the applicant.

Shri S. S. Doifode, A.P.P. for the State.

CORAM : S. B. SHUKRE, J.

DATED : 07 SEPTEMBER, 2016

Heard Shri Rizwan Merchant, learned Counsel for the
applicant and Shri Doifode, learned A.P.P. for the State.

By this application, the applicant has sought direction
of this Court to the effect that the applicant be sent to judicial
custody with liberty to the respondent-State to undertake the
exercise of custodial interrogation of the applicant while in
judicial custody and has also invoked its power under Section 439
of the Code of Criminal Procedure to enlarge the applicant on bail
in Crime No.213/2016. It would be worthwhile to briefly state
the facts of the case. They are reproduced in the following
paragraphs.

On 02/6/2016, crime being Crime No.213/2016 for
the offences punishable under Sections 406, 420, 468, 471,

477(a) and 120-B of the Indian Penal Code and also under Section 23(1) of the Securities Contracts (Regulation) Act, 1956 (for short, the Act, 1956) was registered at Police Station, Akot (City), District Akola on the basis of the report lodged by complainant Mayur Chourasia, Police Sub Inspector attached to Police Station, Akot. The crime was registered against ten accused persons out of which nine were arrested. The applicant is stated to be the main accused in this crime and he could not be arrested as according to the Investigating Officer, he remained absconding all along.

The contention of abscondence was disputed by the applicant. He filed an application for grant of anticipatory bail. However, by an order passed by the learned Sessions Judge on 13/6/2016, his application was rejected. Thereafter, the applicant filed another application for grant of anticipatory bail under Section 438 of the Criminal Procedure Code before this Court and it was registered as Criminal Application (ABA) No. 386/2016. It was filed on 17/6/2016 and came up for hearing on that day itself. On that date, i.e. 17/6/2016, this Court, by way of an ad-interim order, directed that in the event of applicant's arrest in the said crime, he be released on bail. The order was conditional as the applicant was directed to attend Police Station, Akot city on

every alternate day starting from 20/6/2016. This application came up for final hearing on 05/7/2016. It was heard for some time when the learned Counsel for the applicant stated that the applicant was willing to surrender himself to the custody of the concerned Sessions Court/Special Court, if the applicant was granted interim protection till the time he did so. Although, an exception to this proposal was taken by the learned A.P.P. for the State, it was thought fit by this Court to accept the proposal taking into account the fact that the applicant was found to be desirous of showing his bona fides in the matter, which, in fact, was necessary in the face of an allegation of abscondence made against him. Accordingly, this Court extended the interim protection granted on 17/6/2016 till 15/7/2016 or till the date the applicant surrendered himself to the custody of the concerned Sessions Court/Special Court. The applicant was also given liberty to apply for grant of regular bail.

Thus, the applicant was expected to surrender himself to the custody of the concerned Sessions Court/Special Court latest by 15/7/2016. But, the applicant did not do so and chose to file the present application on 12/7/2016. It came up for hearing on 14/7/2016. On that date, a prayer was made for sending the applicant to judicial custody with liberty to the respondent-State

to undertake the exercise of custodial interrogation. Considering the fact that learned A.P.P. did not have ready instructions in the matter and sought time to file reply, this Court did not grant the prayer and noted that the prayer for accepting the custody of the applicant at that stage, could not be considered as the respondent-State would have to be given an opportunity to submit its reply and address the issue raised in the application appropriately. At the same time, this Court extended the interim protection which was already in force and given in terms of order dated 17/6/2016 till next date so as to prevent causing of prejudice to the rights of either of the sides.

In the backdrop of the facts so narrated, this Court is called upon to decide the following questions.:

- (1) Whether the accused can, in principle, surrender himself to the judicial custody of the High Court?
- (2) Whether the physical presence of the accused in the Court coupled with his voluntary submission to the jurisdiction or orders of the Court would by itself amount to taking him to the judicial custody?
- (3) Whether the proposal of the applicant to surrender before this Court, in the facts and circumstances of this case, be accepted?

(4) Whether the applicant deserves to be granted regular bail?

Learned Counsel for the applicant submits that answers to the first two questions are in fact, 'Yes' for the reason that the law in this regard has been settled by the Hon'ble Apex Court in its decision rendered in the case of *Sundeeep Kumar Bafna Vs. State of Maharashtra and another* – **AIR 2014 SC 1745 (Bom.)**. He submits that custody, in the context of Section 439 Cri.P.C., is physical control over or at least physical presence of the accused in Court coupled with submission to the jurisdiction or orders of the Court and when the accused does so, he can be stated to be in deemed judicial custody of the Court. He also submits that there are no restrictions on the High Court to entertain an application for bail provided that the accused is in its custody and the custody of the Court over the accused obtains as soon as the accused actually surrenders himself to the Court. He has also referred to me the order dated 07/5/2015 passed by the learned Single Judge of the Court, in Criminal Bail Application No. 2178 of 2014 (at Bombay) – *Digambar Manohar Satam Vs. The State of Maharashtra*, holding that it was permissible for an accused to surrender himself before the High Court and seek regular bail by following the ratio of the case of *Sundeeep Kumar Bafna* (supra).

Learned Counsel for the applicant further submits that since the act of the applicant in surrendering himself to the jurisdiction of this Court amounted to his placing himself in the judicial custody of the Court and now that time of more than 90 days has expired from the date on which he did so, i.e. the date of 14/7/2016, in view of the law laid down by the Hon'ble Apex Court in the case of *Central Bureau of Investigation Vs. Anupam J. Kulkarni* – **AIR 1992 SC 1768**, the applicant cannot be remanded to police custody and then it would mean that now there would not be any custodial interrogation of the applicant. He further submits that even otherwise, the custodial interrogation of the applicant would not have been necessary as all the seizures have already been made. He also submits that even for recovering any money, custodial interrogation cannot be granted. He places his reliance upon the view taken in this regard by the learned Single Judge of this Court while granting anticipatory bail to a person accused of commission of the offences punishable under Sections 420, 467, 468, 471 and 171 read with Section 34 of the Indian Penal Code, in the order passed on 19/11/2014 in the case of *Avinash Kumar Kale Vs. State of Maharashtra*, a xerox copy of which order is placed on record.

Learned Counsel for the applicant further submits that

the punishment provided for an offence punishable under Section 23(1) of the Act, 1956 shows that the term of imprisonment prescribed therein is optional and not mandatory and the accused against whom the offence is proved, can be punished only with fine. He also submits that this offence is compoundable under Section 23-N and is amenable to grant of immunity to the offender from prosecution under Section 23-O of the Act, 1956. He, therefore, submits that the offence is not of such a serious nature as has been tried to be made out by the prosecution. Thus, the learned Counsel submits that the applicant is entitled to be released on bail.

Learned A.P.P. for the State submits that the application itself is not tenable as the applicant having informed this Court that he was surrendering voluntarily before the trial Court, has not kept his word. According to him, such conduct on the part of the applicant reasonably indicates that the liberty sought by the applicant on 05/7/2016, was only a facade created by him to avoid his detention being made for his custodial interrogation. He further submits that the choice of two Courts was available to the applicant for his surrender, and he exercised his such choice by consciously and voluntarily selecting trial Court and, therefore, now he cannot be allowed to take a somersault

and say that his surrender before this Court be accepted, unless, it is for some extra-ordinary reasons and without any mala fides on his part. He submits that no such reasons are demonstrated by the applicant.

He further submits that mere expression of intention to surrender himself to the jurisdiction of this Court by itself would not amount to placing of the applicant in the custody of the Court or the applicant being in the deemed custody of the Court, unless there is an express order passed by this Court accepting the offer of the accused and taking him in judicial custody. For this submission, he also places his reliance upon the case of *Sundeep Kumar Bafna* (supra).

Learned A.P.P. for the State further submits that any application for grant of bail under Section 439 Cri.P.C. in a case where the Special Judge is appointed to take cognizance of the offence and try the offender cannot be entertained by this Court and existence of order of the Special Court refusing bail is a *sine qua non* for approaching the High Court. For this submission he places his reliance upon the case of *State of Gujrat Vs. Salimbhai Abdulgaffar Shaikh & others* - **AIR 2003 SC 3224**.

As regards the grounds of regular bail to the applicant, the learned A.P.P. for the State submits that considering the

conduct of the applicant, a reasonable apprehension arises in one's mind that if the bail is granted to him, there is a possibility of the applicant misusing the liberty. He also submits that custodial interrogation of the applicant is necessary in as much as no change in circumstances after this Court, instead of exercising its discretion under Section 438 Cri.P.C. in favour of the applicant, has allowed him to surrender before trial Court.

About the first question framed by this Court, I must say, the learned A.P.P. has graciously accepted the position of law as propounded in the case of *Sundeep Kumar Bafna* (supra) and, therefore, I have no hesitation to hold that, in principle, it is permissible for an accused to surrender himself before the High Court and seek regular bail. Learned Single Judge of this Court, by an order dated 07/5/2015 passed in the case of *Digambar Satam* (supra), has taken a similar view following the law settled by the Hon'ble Apex Court in *Sundeep Kumar Bafna* (supra).

In order to find out an answer to the second question, again we will have to turn to the case of *Sundeep Kumar Bafna* (supra). In fact, both the sides are also placing reliance upon this case in order to provide, in their own way, an answer to the second question. In the opinion of the learned Counsel for the applicant, this case settles the issue and lays down that custody

being physical control or physical presence of the accused coupled with submission to the jurisdiction of orders of the Court, the accused comes into judicial custody of the Court the moment he surrenders before the Court and submits to its directions. In other words, in the opinion of the learned Counsel for the applicant, the mere act of surrendering before the Court and submitting to its directions by itself is sufficient to hold that the accused is in judicial custody, which he calls deemed custody. According to the learned A.P.P., the observations of the Hon'ble Apex Court made in different paragraphs have to be read together and when we do so, we would at once notice that merely surrendering before the Court and submitting himself to the jurisdiction of the Court by the accused is not enough and after such surrender and submission, it is necessary for the Court to take a decision on the surrender and submission, which could be in the nature of acceptance or rejection thereof and since this Court did not take any such decision after the applicant expressed his intention to surrender himself before this Court, the decision now would have to be taken. He further submits that from the date of such a decision only that could it be said that the applicant is or is not in the judicial custody, depending upon the decision.

These contentions can be properly appreciated if we go

through the observations of the Hon'ble Apex Court made in the different paragraphs of the judgment in the case of *Sundeeep Kumar Bafna* (supra). The Hon'ble Apex Court, reiterating the view expressed in the case of *Niranjan Singh & another Vs. Prabhakar Rajaram Kharote & others – (1980) 2 SCC 559*, has observed that a person is in custody no sooner he surrenders before the police or before the appropriate Court. The Hon'ble Apex Court, on the question, whether the accused be permitted to surrender to the High Court and further on the plea to be considered for grant of bail by the High Court, has observed that there are no provisions in the Criminal Procedure Code contemplating committal of the case to the High Court, thereby logically leaving its power untrammelled. The Hon'ble Apex Court has further observed that there are no restrictions in the High Court to entertain the application for bail, provided the accused is in its custody and this position obtains as soon as the accused actually surrenders himself to the Court. The relevant observations of the Hon'ble Apex Court appearing in paragraph-22 are reproduced thus :

“In the case in hand, we need not dwell further on this question since the Appellant has filed an application praying, firstly, that he be permitted to surrender to the High Court and secondly, for his plea to be considered for

grant of bail by the High Court. We say this because there are no provisions in the Cr. P. C. contemplating the committal of a case to the High Court, thereby logically leaving its powers untrammelled. There are no restrictions on the High Court to entertain an application for bail provided always the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the Court.....”

It is clear from the above observations that it is possible for the accused to surrender to the High Court with a plea to be considered for grant of bail by the High Court and that there being no restrictions on the power of the High Court to entertain an application for bail, the High Court could always consider the prayer for grant of bail, subject to the condition that the accused is in custody, which position would occur as soon as the accused actually surrenders himself to the Court. The expression, “*the accused actually surrenders himself to the Court*” is significant, and in my humble opinion, it can be properly understood if the observations made in other paragraphs of the judgment are taken into consideration. Therefore, it would be necessary for us to consider the other observations. These observations appear in paragraphs-26 and 27, the relevant portions of which are extracted as follows. :

“26. In conclusion, therefore, we are of the opinion that

the learned single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the Appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Courts custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439 Cr. P.C. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the Applicant/appellant had shown sufficient reason or grounds for being enlarged on bail.

27. The impugned Order is, accordingly, set aside. The learned single Judge shall consider the Appellant's plea for surrendering to the Court and dependent on that decision, the learned single Judge shall, thereafter, consider the Appellant's plea for his being granted bail. The Appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later...."

These observations show that as a matter of principle, a Court has to either accept or reject the prayer of the accused to surrender himself to the Court's custody and that a decision regarding acceptance or rejection of the prayer for surrendering to the Court's custody is required to be taken by the Court to whose

jurisdiction the accused offers himself to surrender. If the decision is of acceptance of the custody, the Court would be obliged to consider the prayer of the applicant for grant of bail, in accordance with law. This is clear from the final directions issued by the Hon'ble Apex Court that the learned Single Judge shall consider the appellant's plea for surrendering to the Court and dependent on that decision, the learned Single Judge shall, thereafter, consider the appellant's plea for his being granted bail. This is also clear from the observations made in paragraph-26 to the effect, *"Conceptually, he could have declined to accept the prayer to surrender to the Court's custody..... Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439, Cr.P.C."*. Harmoniously reading these observations with those in paragraph-22, I find that the offer made by the accused, i.e. the applicant, to surrender himself to the custody of this Court by itself would not amount to placing himself or his being taken in or his being in deemed judicial custody within the meaning of Section 439, Cr.P.C., that a specific decision regarding acceptance or otherwise of such an offer would be required, that as and when his surrender before the Court is accepted, then only it would amount to his actually surrendering before the Court

thereby indicating that the accused is taken in judicial custody of the Court and that the Court can then exercise its power under Section 439, Cr.P.C. The answer to the second question, therefore, goes in the negative.

Now, the question, whether the proposal given by the applicant to surrender himself to the judicial custody of this Court, in the facts and circumstances of this case, be accepted or not, has to be decided. According to the learned Counsel for the applicant, the learned Sessions Judge while rejecting anticipatory bail application of this applicant and also the bail applications of other applicants has made such observations as to create a reasonable apprehension in the mind of the applicant that if he surrendered before the trial Court and invoked its jurisdiction under Section 439 Cr. P. C., he may not get justice. This is countered by the learned A.P.P by submitting that when the applicant has never submitted himself to the custody of the trial Court, the question of raising of any such apprehension in the mind of the applicant would not arise as the applicant never tested the mind of the trial Court on this issue.

I think, learned A.P.P. for the State is right in his submission that the occasion for testing the mind or inclination of the trial Court has never arisen in view of the fact that the

applicant never even has made an attempt to keep his word given to this Court to surrender himself to the jurisdiction of trial Court. I must say, rejection of an application for grant of anticipatory bail is not akin to rejection of an application for grant of regular bail. Then, the facts and circumstances applicable to one accused may not be the same as are applicable to another accused. Therefore, just because some orders regarding rejection of bail applications were passed in the past, it cannot be reasonably said that similar order of rejection of bail application will also be passed in the case of the present applicant. The applicant has to show something more so as to justify that his apprehension is reasonable. But, he has not done so, rather, he has not even gone before the trial Court for seeking its discretion for grant of bail under Section 439 Cr.P.C.

There is also another dimension involved in the matter. In fact, this very reason was available to the applicant on 05/7/2016 when he chose to surrender before the trial Court and for that reason only he could have opted to surrender before this Court at that time itself. But, he did not. Now, again approaching this Court on a ground earlier available but not taken shows mala fides on his part. One could have understood if the applicant, for reasons beyond control, could not surrender before the Court selected earlier by

him. But, that is not the case here, The attempt being made by the applicant, in my view, points towards somewhat defiant behaviour of the applicant. It gives an impression that he does not treat orders of the Court with respect and sanctity. If applicant's such a plea is to be accepted in the facts and circumstances of this case, as discussed earlier, it would breed confusion in the mind of the investigating agency as well as the trial Court as to how to go about the job of investigation and exercise power under Section 167 Cr.P.C. It may also result in promoting indiscipline among the persons accused of committing offences which in turn may lead to lowering of respect for the law.

For all the reasons stated above, I am not inclined to accept the surrender of the applicant before this Court and also grant his plea for taking him into the judicial custody. The prayer in this regard is, therefore, rejected. The third question is answered accordingly.

Learned Counsel for the applicant submits that when this Court extended interim protection to the applicant on 14/7/2016, it became clear that this Court had granted interim bail to the applicant thereby indicating the fact that this Court had impliedly accepted the custody of the applicant. I beg to differ

with him. The order dated 14/7/2016 is clear and unequivocal in this regard. It has been observed that the prayer for accepting the custody of the applicant could not be considered, as the respondent-State was required to be given an opportunity to submit its reply and address the issue raised in the application in a proper manner and that at the most, this Court could extend interim protection to the applicant so that no prejudice was caused to the rights of either of the sides. With these observations, this Court in no uncertain terms gave a direction to the effect, *“the interim protection granted to the applicant by this Court as per the order dated 5th July, 2016 is hereby extended till next date.”* Such an interim protection eventually was extended until further orders. It is clear that the interim protection granted to the applicant was as per order dated 05/7/2016 and the order dated 05/7/2016 passed in Criminal Application (ABA) No. 386/2016 gave the interim protection to the applicant only in terms of the order of this Court passed on 17/6/2016 in that application. The order dated 17/6/2016 was nothing but an order of interim anticipatory bail. So, what is clear now is that not only that this Court did not accept immediately the custody of the applicant but this Court also did not grant interim regular bail to the applicant on 14/7/2016 and what it granted was only

extension of interim anticipatory bail. This order was never disputed by the applicant nor did he challenge this order. The applicant has continued to enjoy the benefit of such an interim order all throughout. Therefore, the argument made in this regard cannot be accepted and is rejected accordingly.

As regards the ratio of case of *Salimbhai Shaikh* (supra), I find that the same would not be of any assistance to the prosecution for the reason that the law that High Court cannot directly entertain a bail application when the offender is being proceeded under the provisions of a Special Act has been laid down while interpreting the import of Section 34 of the Prevention of Terrorism Act, which prescribes that the appeal must be filed from any judgment, sentence or order, which is not an interlocutory order. Such a provision is not to be found in the Securities Contracts (Regulation) Act nor the learned A.P.P. for the State has shown to me any existence of such a provision in the said Act.

Now, the last question about which I would say, as this Court has refused to accept the custody of the applicant, there would be no question of deciding on the further plea of the applicant for grant of regular bail. As such, I do not think it necessary to consider the arguments of both the sides canvassed

in this regard. It would also follow that the view taken by the learned Single Judge of this Court in the case of *Avinash Kale* (supra) may stand in good stead for the applicant as and when the occasion for him to invoke the jurisdiction of the Court under Section 439 Cr.P.C. would arise.

In the result, this application deserves to be rejected and it is rejected accordingly.

It is directed that the applicant shall comply with the order of this Court passed on 05/7/2016 in Criminal Application (ABA) No. 386 of 2016 within two weeks from the date of this order and till that time or till the time he complies with the said order, whichever is earlier, interim protection granted to him in terms of the order dated 17/6/2016 shall stand continued.

JUDGE

CERTIFICATE

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