

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1583 OF 2017

Shaikh Chand Shaikh Ahmed,
Age : 28 Years, Occ.: rikshaw Driver,
R/o : Lane No.2, Ambika Nagar,
Mukundwadi, Aurangabad. ...

PETITIONER

VERSUS

1. **The State of Maharashtra,**
Through Secretary,
Home Department, Mantralaya,
Mumbai -400 032.
2. **The Commissioner of Police,**
Aurangabad, Mill Corner,
Aurangabad - 431001.
3. **The Police Inspector,**
Kranti Chowk Police Station,
Aurangabad - 431 001. ...

RESPONDENTS

....

Mr. Sayyed Tauseef Yaseen, Advocate for petitioner.

Mr. A. A. Jagatkar, APP for respondent Nos. 1 to 3.

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CORAM : PRAKASH D.NAIK, J.

DATE : 4th December, 2017.

ORDER :-

The petitioner has taken exception to the order dated 2nd November, 2017 and the order dated 6th November, 2017 passed by the learned Chief Judicial Magistrate, Aurangabad.

2] The petitioner was arraigned as accused in C.R. No. 783 of 2017 registered with Kranti Chowk Police Station for the offence punishable under Section 385 of the Indian Penal Code. The First Information Report (for short 'the F.I.R'.) was registered on 1st November, 2017 at the instance of one Rahul Pagariya at Kranti Chowk Police station. In the F.I.R., it was alleged that the first informant is the owner of a showroom. On 19-10-2017, at about 05.30 p.m., he was at the showroom. One unknown person handed over a closed envelope, which was addressed to him through his Security Guard. He opened the said envelope and found a threatening letter demanding Rs. 7,00,000/- with the threat that the family member of the complainant will be killed, in case the demand was not fulfilled. It was also stated that he has accepted the contract to kill one of the family members of the complainant and that he should not inform the police about the same. The complainant approached Crime Branch on 20-10-2017. The police made inquiries with one auto-rikshaw driver, who stated that he had forwarded the said letter to the Security Guard of the complainant.

3] The petitioner was arrested by the Police on 01-11-2017 and he was produced before the Court of the In-charge Chief Judicial Magistrate on 2nd November, 2017 for remand. The learned Magistrate remanded the petitioner/accused to police custody till 06-11-2017. The petitioner preferred an application for bail before the Court of Chief Judicial Magistrate on 06-11-2017. The petitioner was produced before the Court

for remand on 06-11-2017. The Court remanded the accused to police custody till 10-11-2017. The bail application preferred by the petitioner was, however, rejected.

4] The petitioner has challenged the order dated 2nd November, 2017 remanding the petitioner to police custody till 06-11-2017 and the order dated 06-11-2017 by further extending the police custody till 10-11-2017 and refusing bail to the petitioner. It is prayed that the remand be declared as illegal. It is also prayed that compensation be awarded for his illegal detention.

5] The learned counsel for the petitioner submits that the petitioner was arrested on 01-11-2017 for offence under Section 385 of the I.P.C. The said offence is bailable in nature and law mandates that when a person is arrested in bailable offence, an Officer In-charge of Police Station was supposed to inform the accused of his right to be released on bail. In the present case, the procedure enumerated under Section 436 of the Cr.P.C. was not followed. The police also did not follow the guidelines laid down by the Supreme Court in the case of **D.K. Basu Vs. State of West Bengal** reported in (1997) 1 SCC 416. It is submitted that the order of remand was contrary to the provision of Section 436 of the Cr.P.C. Since the offence was bailable, the petitioner ought to have been granted bail and should not have been remanded in police custody. It is submitted that when any person

other than a person accused of a non bailable offence, and if he is prepared at any time to give bail, such person shall be released on bail. The law makes it mandatory to grant bail to the person, who is accused of committing bailable offence. There is no discretion left with the Court to refuse the bail. It is further submitted that the learned Magistrate, before whom the petitioner was produced, has violated the provisions of law and the guidelines laid down by the Apex Court in **Arnesh Kumar Vs. State of Bihar** reported in **(2014) 8 SCC 273** and he was illegally remanded to custody till 06-11-2017. It is submitted that the first proviso to sub-section 1 of Section 436 of the Cr.P.C. also provides for dispensing with the necessity to furnish surety when the Court is of the opinion that the person is indigent and is unable to furnish surety. In such an event, instead of taking bail, such a person is to be released on his own bond for his own appearance. It is further submitted that the explanation of the said section also provides that, if a person arrested for a bailable offence is unable to give bail within a week from the date of arrest, the same shall be sufficient ground to hold that he is an indigent person for the purpose of exemption contained in the proviso. It is submitted that the said provision also is to be interpreted to contain a direction to the Magistrate to inform the accused of his right to get released on bail, if he is prepared to give bail to the satisfaction of the Court. It is submitted that the Court failed to inform the petitioner that he was accused of the bailable offence and he could seek his release on bail if he is prepared to furnish surety to the satisfaction of the Court, and also turned

down the request for being released on bail. The Court, therefore, passed illegal orders of remand, which are required to be set aside. The order of remand violates the right under Article 21 of the Constitution of India. It is submitted that the petitioner preferred an application for bail on 06-11-2017. Further police custody was sought by the police. The Court, however, refused to grant bail. It is submitted that the grant of bail in bailable offence is absolute and indefeasible right of accused. He is to be informed by the Officer-in-charge of Police Station or the concerned Court of his right to be released on bail. There is no question of any discretion in granting bail in bailable offences. The custody amounts to illegal detention. The fundamental right of the petitioner is violated. It is, therefore, prayed that the aforesaid orders be quashed and set aside and the relief prayed in this petition be granted.

6] Learned APP submitted that there is no violation of the fundamental right of the petitioner. There is no illegality in the order of remand. The Court has rightly remanded the petitioner to police custody and has also refused the prayer for bail. It is submitted that the complaint makes out an offence under Section 386 of the IPC and merely because the format of the F.I.R. mentions the offence under Section 385 of the IPC, the offence does not become bailable. The F.I.R. makes out the offence under Section 386 of the IPC which is non-bailable and, therefore, there is no illegality in the order passed by the Court. The first informant has also

intervened by preferring an application for intervention. The first informant has reiterated the submissions advanced by learned APP. It is contended that the ingredients of Section 386 of the IPC are attracted. It is also submitted that the charge under Section 307 of the IPC is also attracted. It is submitted that the learned Magistrate is required to act in conformity with the provisions of Section 167 of the Cr.P.C. and, therefore, the Court has committed no error while passing the order. Per contra, the learned Advocate for the petitioner submitted in re-joinder that the F.I.R. was lodged under Section 383 of the IPC. The remand application under Section 311 of the Cr.P.C. indicates that the offence under section 385 of the IPC and, therefore, at the time when the petitioner was arrested and produced before the Court, the prosecution was seeking custody for the offence punishable under Section 385 of the IPC and, therefore, it was imperative to release the petitioner on bail as the offence under Section 385 of the IPC being bailable in nature.

7] The learned counsel for the petitioner has placed reliance upon several decisions in support of his submissions, which are as follows :-

- (i) **Rasiklal Vs. Kishor s/o Khanchand Wadhwani, (2009) 4 Supreme Court Cases 446.**
- (ii) **Bharat Salvi and oths Vs. State of Maharashtra, 2016 (1) Bom. C.R. (Cri.) 781.**
- (iii) **A.Ochu.... Vs. State, 2012 SCC OnLine Mad 137.**

(iv) Kanubhai Chhaganlal Brahmbhatt Vs. State of Gujrat 1973, CriLJ 533.

(v) Mohit Ram Chouhan Vs. state of M.P., 2001(1) MPHT 435.

(vi) Pravinkumar Chandrakant Vyas Vs. State of Gujarat and Ors., 2002(1) G.L.H. 104.

8] I have given anxious consideration to the submissions advanced by both the parties. The petitioner contends that he was subjected to illegal detention and, therefore, seeks declaration that the custody was illegal and he should be awarded compensation and that the orders of the remand of the accused is illegal. The F.I.R. was lodged for an offence under Section 385 of the IPC. It is obvious that the offence being bailable in nature, the accused is entitled for the right and remedy provided under Section 436 of the Code of Criminal Procedure. The question is whether, mere invoking a particular criminal provision which constitutes a bailable offence, when the F.I.R. makes out a serious offence or the offence which is non-bailable in nature, it is imperative for the Court to release such a person on bail in exercise of powers under Section 436 of the Cr.P.C. In the present case, in the format which is attached to the statement of the complainant, though the offence was registered under Section 385 of the IPC, which is a bailable offence, the contents of the F.I.R., however, would attract ingredients of Section 386 of the IPC.

9] Section 386 of the IPC reads as follows :

"386. Extortion by putting a person in fear of death or grievous hurt.—Whoever commits extortion by putting any person in fear of death or of grievous hurt o that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".

10] On reading the aforesaid penal provision, it is clear that the same is applicable in the facts of the present case as the complaint makes out the ingredients to constitute the said offence. Section 385 of the IPC was in relation to the offence putting person in fear of injury in order to commit extortion. However, Section 386 of the IPC relates to the extortion by putting any person in fear of death of that person or to any other. There is no manner of doubt that reading the allegations in the complaint, the offence under Section 386 of the IPC is made out. When the petitioner was produced for remand before the Chief Judicial Magistrate on 2nd November, 2017, it was mentioned that the petitioner is involved in commission of the offence of extortion. The contents of the remand application also fortifies the ingredients for the offence under Section 386 of the IPC. Although in the title of the said application Section 385 of the IPC is mentioned as crime section, after narrating the alleged crime committed by the petitioner, it has been stated in the remand application that the custody of the petitioner is required for further investigation. Therefore, the police sought remand of

the petitioner-accused for a period of five days. The learned Magistrate, while remanding the petitioner to police custody till 6-11-2017, has observed that the submissions of both the parties show that the envelope contained one letter allegedly demanding Rs. 7,00,000/- from the informant and in case of failure to do so, there was a threat to commit death of the informant or any member of his family. To find out as to who has given the said letter to the accused, the presence of the accused in police custody is necessary, unless and until he is thoroughly interrogated, there cannot be progress in the investigation. Therefore, the accused is remanded to police custody till 06-11-2017. On reading the said order, it is clear that, the learned Magistrate has applied his mind to the fact that the applicant is involved in commission of crime allegedly demanding huge amount and in case of failure to do so had issued threat of death to the informant or any member of his family and it is for that reason, for the purpose of further interrogation, and investigation police custody was granted. The observation made by the Court are in consonance with the offence under Section 386 of the IPC. The police custody was, therefore, granted based on those observations. It was not necessary for a Court to mention in the order that the offence under Section 386 of the IPC is made out. The order shows application of mind on the part of the Court. The Court has considered the allegations in the F.I.R. and, therefore, passed the order of remand to police custody. The mentioning of offence under Section 386 of the IPC in the format of the F.I.R. or even in remand application would not preclude the

Court from exercising the powers of remand when the offence is non bailable as per F.I.R. By assigning the reasons, which support non bailable offence, the Court has remanded the accused to custody and there is no reason to set aside such an order. The powers under Section 386 of the Cr.P.C. as submitted by learned Advocate for the petitioner would certainly provide such right of bail to the accused whenever he is concerned with a bailable offence. In Catena of decisions, the Supreme Court as well as this Court has observed that a person, who is arrested for an offence which is bailable, under Section 436 of the Cr.P.C., the Court has to release such person on bail. Section 436 of the Cr.P.C. provides that when a person other than a present accused of non bailable offence is arrested or detained without warrant by an officer in-charge of police station or appears or is produced before the Court, and is prepared at any time in custody of such officer or any such of the proceedings before such Court to give bail, such person shall be released on bail and the proviso makes it clear that if it is found that the person is indigent and is unable to furnish surety, instead of taking bail, he could be discharged on executing bond without sureties or his appearance.

11] When the petitioner accused was produced before the Court for remand on 2nd November, 2017, he did not make a grievance that the offence is bailable in nature. He did not make an application for bail on the ground that the offence is bailable in nature. The Court, however,

remanded him to police custody on the basis of the contents of the remand application and whatever the case put up before the Court. From the contents of the F.I.R., the remand application and the grounds of remand support the case for an offence of non bailable nature, it was not expected from the Court to inform the accused that he had a right to be released on bail. The petitioner thereafter preferred an application for bail on 06-11-2017. The accused was again produced before the Court for further remand. The Court rejected the application for bail. In the order dated 06-11-2017 granting remand to police custody till 10-11-2017, the Court had observed that the contents of the F.I.R. prima-facie disclose the offence punishable under Section 386 of the IPC. It is pertinent to note that the argument was advanced on behalf of the accused that the offence is bailable. The said argument was rejected by the Court. It was further observed that the accused needs to be interrogated. Therefore, the Court was pleased to remand the accused to police custody till 10-11-2017 and the bail application preferred by the petitioner was rejected.

12] In the aforesaid circumstances, I do not find any illegality in the orders by the Court remanding the petitioner to police custody. It was submitted by the prosecution that subsequently the charge under Section 307 of the IPC is also invoked against the petitioner. As per the contents of the F.I.R. the non bailable offence is made out and, therefore, there is no substance in the contention of the accused that on the date of remand the

offence was bailable in nature and he should not have been remanded to custody. If the offence under Section 385 of the IPC itself was made out, then the grievance of the petitioner could have been looked into. The learned Advocate for the petitioner had also pointed out Sections 50, 56 and 57 of the Code of Criminal Procedure. As per the said provisions, the person arrested is to be informed of ground of his arrest and of right to bail and also be communicated with full particulars of the offence and that the person arrested to be taken before the Magistrate or Officer in charge of the police Station and shall not be detained for more than 24 hours in the absence of special order of a Magistrate under Section 167 of the Cr.P.C. It is submitted that in the light of aforesaid provisions, the petitioner was entitled to be released on bail after being informed that the offence is bailable in nature and the Court ought to have granted bail in respect of remanding him in custody. For the reasons stated hereinabove, the submissions advanced by the petitioner cannot be entertained. It is also pertinent to note that when an accused was produced before the Court, the Magistrate has to act in conformity with Section 167 of the Cr.P.C. When a person is arrested and the investigation cannot be completed within a period of 24 hours and there are improvements for believing that the accusation is well founded , the police officer shall transmit the copy of the entries in a diary relating to the case and shall also forward accused to such Magistrate. The Magistrate then is required to authorize the detention of the accused in such custody as such Magistrate thinks fit for a period not exceeding 15 days

in the whole. The Magistrate can also authorize the detention of the accused otherwise than in the custody of the police for a period of 15 days, if it is satisfied that adequate grounds exist for doing so. It is, therefore, apparent that when the accused is produced before the Court, the Magistrate is required to apply his mind to the documents produced before him. The remand application preferred before him, the reasons for police custody meted out by the police and then remand to police custody. The order dated 2nd November, 2017 is, therefore, passed in consonance with Section 167 of the Cr.P.C.

13] The learned counsel for the petitioner has placed reliance upon several decisions, which are referred to here-in-above. It is settled law that right to claim bail granted by Section 436 of the Cr.P.C. is absolute and indefeasible right. The said dictum is enunciated in the aforesaid decision. However, in the aforesaid circumstances, it cannot be said that there is violation of the provisions of Section 436 of the Cr.P.C. In bailable offences, there is no question of discretion in granting bail as the words of Section 436 are imperative. As soon as it appears that accused person is prepared to give bail, the police officer or the Court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the Court to be reasonable. It would be even open to the officer or the Court to discharge such person on his executing a bond as provided in Section 436 of the Cr.P.C., instead of taking bail from him. The

petitioner is however, taking the advantage of the fact that the format of F.I.R. incorporated Section 436 of the Cr.P.C., which is bailable offence, whereas the contents of the F.I.R. make out the offence, which is not bailable in nature. There is application of mind on the part of the Court while remanding the person in custody and hence decisions relied upon by the petitioner are not applicable in the present case.

14] For the reasons stated here-in-above, the relief sought by the petitioner cannot be granted and the petition, therefore, deserves to be dismissed. Hence, I pass the following order :-

O R D E R

1. Criminal Writ Petition No. 1583 of 2017 is hereby rejected.
2. Petition stands disposed of.

[PRAKASH D.NAIK, J.]

shp

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