

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

208

CRM-M No.18043 of 2018

Date of Decision: May 7th, 2018

Mandeep Kaur

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Dr. Anmol Rattan Sidhu, Senior Advocate
with Mr. Raghav Gulati, Advocate
for the petitioner.

Mr. Apoorv Garg, Deputy Advocate General, Haryana,
for the State.

Mr. Deepinder Brar, Advocate
for the complainant.

AUGUSTINE GEORGE MASIH, J.

This petition under Section 439 of the Code of Criminal Procedure, 1973, (hereinafter referred to as 'Cr.P.C.') has been preferred for grant of regular bail in FIR No.229 dated 13.07.2016 registered at Police Station Sector-5, District Panchkula, under Sections 406, 420, 467, 468, 471, 457, 380, 379 and 120-B of the Indian Penal Code, 1860, with a further prayer for extension of stay of arrest as granted by the Hon'ble Supreme Court by order dated 06.04.2018 (Annexure P-7), during the pendency of the petition.

2. Briefly the facts are that the above referred to FIR was registered against the petitioner, who is the daughter-in-law of the complainant, with the background and allegations that the petitioner and the son of the complainant had some dispute between them, which was resolved and the matter was patched up in the presence of some family members.

Thereafter petitioner along with her daughter left the matrimonial home

taking with her the entire articles when no one was in the house. She also

took away an Alto Car bearing No.H.R-03-1721 which was in the name of the husband of the complainant. Petitioner, after some days, met the complainant and started saying that she wanted divorce from her son and that he should put his signatures on the documents relating to a divorce petition prepared under Section 13-B of the Hindu Marriage Act. The son of the complainant refused to do so. Thereafter a notice was received through Court in a divorce petition preferred by the petitioner under Section 13 of the Hindu Marriage Act. In this petition it was mentioned that the complainant had transferred an amount of ₹39,00,058/- in the account of the petitioner through RTGS as a gift for livelihood of her granddaughter. When the complainant checked her cheque book and other valuable articles, it came to light that one cheque No.593008, ₹82,000/- as well as 23/25 tolas of gold, one silver anklet and two silver coins were missing from her almirah. On inquiry from the bank, it came to light that the missing cheque was used for forging her signatures by petitioner and others for transferring the above referred to amount through RTGS in the account of petitioner. When the complainant objected to the transfer of such a huge amount from her account and that too without her consent and knowledge, she was threatened. It was mentioned that the complainant being the nominee of her deceased husband, this money had come to her containing the lifetime earnings of her deceased husband .

3. On registration of the FIR, petitioner filed a petition for grant of anticipatory bail, which was dismissed by the trial Court and thereafter she preferred similar petition before this Court under Section 438 Cr.P.C. i.e. CRM-M No.320 of 2017 which was dismissed by a detailed order on 08.03.2018 (Annexure P-6). After the dismissal of the said petition,

Petition for Special Leave to Appeal (Crl.) No.2741/2018 was preferred, which came up for hearing before the Hon'ble Supreme Court on 06.04.2018 when the same was dismissed, however, stay of arrest of the petitioner for four weeks was granted with an observation that in the meantime, petitioner may apply for regular bail.

4. In pursuance thereto, petitioner filed a petition under Section 439 Cr.P.C. before the Chief Judicial Magistrate, Panchkula, which after consideration was dismissed on 16.04.2018. Thereafter an application under Section 439 Cr.P.C. was preferred by the petitioner for grant of regular bail on 18.04.2018, which was dismissed by the learned Additional Sessions Judge, Panchkula, by order dated 20.04.2018 (Annexure P-10). It is now, that the petitioner has approached this Court through the present petition for grant of regular bail.

5. It is the contention of learned senior counsel for the petitioner that in the earlier petitions which were preferred under Section 438 Cr.P.C. for grant of anticipatory bail when interim protection was granted to the petitioner, she had joined investigation and cooperated with the same. No recovery is to be effected from the petitioner and, therefore, she be granted the benefit of regular bail. He, however, admitted the fact that an amount of ₹ 39,00,058/- had been transferred through RTGS from the account of the complainant into petitioner's account and had also stated that out of this amount, ₹5,00,000/- have been spent in the education of the granddaughter of the complainant as she is studying in a prestigious boarding school and the remaining amount of ₹34,00,000/- will not be returned by the petitioner as it is required by her for her as well as that of her minor daughter's sustenance. He does not dispute that the facts which

existed at the time of dismissal of her application for grant of anticipatory bail by this Court by order dated 08.03.2018 (Annexure P-6) have not changed except that thereafter the petitioner had approached the Hon'ble Supreme Court and on 06.04.2018, her arrest was stayed for four weeks giving her the liberty to apply for regular bail. He submits that when she had moved an application for grant of regular bail before the trial Court, she had submitted to the jurisdiction of the Court but the said application has not been accepted. It has further been submitted by learned senior counsel for the petitioner that a grave error has been committed by the learned Additional Sessions Judge, Panchkula, as he has treated the application of the petitioner as one under Section 438 Cr.P.C. as is apparent from the heading and the opening of the order and, therefore, the said order deserves to be set aside. He, however, states that as of date, the period of stay granted in favour of the petitioner, does not exist as the period has expired on 04.05.2018. Prayer has thus been made by the learned senior counsel for the petitioner that the stay of arrest of the petitioner be extended.

6. Counsel for the State as well as the complainant have objected to the maintainability of the present petition on the ground that as of today, arrest of the petitioner is not stayed. It is asserted that the petitioner has not appeared in any Court in person i.e. before the Chief Judicial Magistrate, Panchkula, or the Additional Sessions Judge, Panchkula, or this Court. Therefore, the present petition under Section 439 Cr.P.C. is not maintainable as the benefit of regular bail can only be granted to a person, who is in the custody of the Court. That apart, counsel for the complainant contends that the factum of the cheque having been stolen, which has been used for the purpose of transferring the life long earnings of the deceased

husband of the complainant through RTGS into the account of the petitioner by forging the signatures of the complainant which fact has been established on the basis of report of Forensic Science Laboratory, with the petitioner still insisting upon retaining the remaining amount of ₹34,00,000/-, which admittedly is a part of the transferred amount into her account and is in her possession apart from stolen articles, she is not entitled to the concession of regular bail as prayed for. As regards the contention of learned senior counsel for the petitioner that the learned Additional Sessions Judge, Panchkula, has erroneously treated application of the petitioner for regular bail as anticipatory bail application under Section 438 Cr.P.C., is a typographical error in the heading of the order as in the concluding part of the order, it has specifically been mentioned that application is for grant of regular bail, which was dismissed. It is, therefore, prayed that that the present petition deserves to be dismissed.

7. I have considered the submissions made by the counsel for the parties and with their able assistance, have gone through the facts of the case and the documents on record.

8. Dealing firstly with the question of maintainability of this petition in the present form under Section 439 Cr.P.C.

9. Section 439 Cr.P.C. reads as follows:-

“439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;

(b) that any condition imposed by a Magistrate when releasing

a person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

Perusal of the above would show that apart from the person, who is an accused of an offence, for maintainability of the application under Section 439 Cr.P.C., such person has to be in custody. Word 'custody' has not been defined in the Cr.P.C. However, the Hon'ble Supreme Court in *Niranjan Singh and another Versus Prabhakar Rajaram Kharote and another* 1980(2) SCC 559 had the occasion to consider the same and in paras 7 to 9, held as follows:-

“7. When is a person in custody, within the meaning of Section 439 Cr. P.C. ? 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 of an officer with coercive power is in custody for the purpose of Section 439. This 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 straight forwardness of the law. We

need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. *Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or an 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 maybe, 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.”*

(Emphasis is mine)

10. Hon'ble Supreme Court further in *Sunita Devi Versus*

State of Bihar and another 2005(1) SCC 608 had reiterated the same

principle and in paras 13 to 15, had stated as follows:-

“13. In view of the clear language of Section 439 and in view of the decision of this Court in Niranjana Singh and another v. Prabhakar Rajaram Kharote and others, AIR 1980 Supreme Court 785, 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. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

14. 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 equivocal 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 determined him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straight forwardness of the law.

15. 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 characterised 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.”

11. In view of the above and especially, in the light of the fact that the petitioner had not appeared before this Court today, it cannot be said that the petitioner is in custody as per the law laid down by the Hon'ble Supreme Court in the above two referred judgments. Therefore, the present petition is held to be not maintainable as there is no stay of arrest of the petitioner after 04.05.2018.

12. That apart, even on merits, as is apparent from the facts as narrated in the earlier part of the order, especially when huge amount i.e. ₹39,00,058/- stands transferred in the account of the petitioner which having been so admitted, has refused to return at least the remaining amount of ₹34,00,000/-, rather insisting upon using the same for her and for her daughter's benefit apart from the allegations of theft of valuable jewellery, cash etc. and the factum of there being forgery with regard to the signatures of the complainant and the petitioner being the beneficiary of that forgery, no ground for grant of regular bail is also made out by this Court.

13. In view of the above, finding no merit in the present petition, the same stands dismissed.

May 7th, 2018

Puneet

(AUGUSTINE GEORGE MASIH)

JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No