

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

CRM-M No.26466 of 2018 (O&M)

Date of decision : 24.08.2018

Davinder Bhadana

.....Petitioner

Versus

State of Haryana

...Respondent

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Argued by : Mr. S. K. Garg Narwana, Senior Advocate with
Mr. Vishal Garg, Advocate and
Mr. Naveen Gupta, Advocate for the petitioner.

Mr. Chetan Sharma, AAG, Haryana.

Mr. Ashok Aggarwal, Senior Advocate with
Mr. Sanjiv Kumar Aggarwal, Advocate and
Mr. Umesh Aggarwal, Advocate for the complainant.

* * *

DAYA CHAUDHARY, J.

Petitioner Davinder Bhadana has approached this Court by way of filing the present petition under Section 439 of the Code of Criminal Procedure, 1973 (for short – ‘the Cr.P.C.’) for grant of regular bail to him in case FIR No.198 dated 06.04.2017 under Sections 420, 467, 468, 471, 506, 120-B of the Indian Penal Code, 1860 (for short – 'IPC') and also under Section 204 IPC (which was added subsequently) registered at Police Station Suraj Kund, District Faridabad. A prayer has also been made for setting aside order dated 01.06.2018, whereby the application filed by the petitioner for grant of regular bail has been dismissed.

Mr. S. K. Garg Narwana, learned senior counsel for the petitioner submits that the petitioner has falsely been implicated in the case, whereas he was not involved and no offence is made out against him. The FIR has been registered just to harass the petitioner. There is delay of more than two years in lodging of the FIR, which has not been explained. The complainant and the petitioner are brothers. The allegations in the FIR relate to the period from June-July, 2014 to 03.04.2015. It has been mentioned in the FIR that the complainant received a legal notice on 11.01.2017 and, thereafter, he came to know about the illegal act and conduct relating to agreement to sell dated 15.12.2014. Learned counsel also submits that even the complaint was made to the police after a period of more than two months from the date of receipt of legal notice dated 11.01.2017. Learned senior counsel for the petitioner further submits that the complainant has also filed a civil suit on 24.12.2015 and FIR has been registered subsequently after a delay of more than one and a half year which is abuse of process of law. The present FIR is the counter-blast to FIR No.649 dated 13.10.2016 under Sections 323, 506, 427 and 34 IPC registered at Police Station Suraj Kund, Faridabad, which was got registered by the petitioner against the complainant and his family members. The petitioner has paid an amount of Rs.50,00,000/- as earnest money out of total sale consideration of Rs.76,00,000/- to the complainant and possession of the land in dispute was also handed over to the petitioner and one Ranjit. In FIR No.647 dated 13.10.2016, the challan has been presented against the complainant and his family members. Learned senior counsel further

submits that the criminal shape has been given to a civil dispute and the present FIR has been lodged just to put pressure upon the petitioner to settle the dispute pending before the Civil Court. Even in the reply filed in the civil suit, it has been admitted by the complainant that the property in dispute has been sold out to the present petitioner and Ramjeet Singh and possession has already been handed over to them. In said civil suit, the old numbers have been mentioned, whereas in the present FIR, new numbers have been mentioned as these numbers were allotted after consolidation proceedings. After execution of the above said agreement to sell dated 15.12.2014, one complaint was also filed by the wife of the complainant against the petitioner alleging outraging of modesty before Women Cell, Police Station NIT, Faridabad, which was inquired into by the police and allegations were found to be false. Learned senior counsel further submits that it has been alleged in the FIR that there are two different agreements to sell, where more amount than the actual has been mentioned. It has been done by showing the photocopy of the agreement to sell, whereas the petitioner is having original copy of the agreement to sell. It has been well settled in various judgments of this Court as well as Hon'ble the Apex Court that with the advance technology, signatures can be picked up from one page/place and can be affixed at some other page/place. It is not the case of the complainant that his signatures were obtained on blank papers. Said agreement to sell was attested by two attesting witnesses namely Narinder and Ranbir Singh, which shows that agreement to sell was proved beyond any doubt. Said witnesses have been released on ad interim anticipatory bail

and thereafter, the interim orders passed in their favour have been made absolute. Learned counsel submits that anticipatory bail of the petitioner has been dismissed by learned Additional Sessions Judge, Faridabad only on the ground that the petitioner had failed to arrive at an amicable settlement and nothing has been said on merits. At the end, learned senior counsel for the petitioner submits that under the directions/orders passed by this Court, the petitioner has surrendered before the trial Court and he now is in custody. The offence is triable by Magistrate and no purpose would be served by keeping him in custody as not only at the time of pendency of bail application before the lower court, the petitioner was ready to settle the dispute with the complainant, who is his brother but still he is ready to settle the dispute, in case he returns amount of Rs.50,00,000/-, which has actually been paid by the petitioner. It is not the petitioner but the complainant who did not agree for settlement. The wrong finding has been given by the lower court while declining bail. In support of his arguments, learned senior counsel has relied upon judgments of Hon'ble the Apex Court in cases ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others 2011(1) R.C.R. (Criminal) 126*** and ***Sundeep Kumar Bafna Vs. State of Maharashtra and another 2014(2) R.C.R (Criminal) 416***.

Mr. Chetan Sharma, learned Assistant Advocate General for the State of Haryana has opposed the submissions made by learned senior counsel for the petitioner on the ground that the petitioner was not in custody when this petition was filed and also that serious allegations are there against him. It has also been submitted by learned State counsel that

the petitioner has approached this Court for grant of regular bail, whereas he has not availed the remedy of regular bail before the lower court and this petition is liable to be dismissed on this ground alone.

Mr. Ashok Aggarwal, learned senior counsel for the complainant has also raised a preliminary objection that the present petition is not maintainable as the petitioner was not in custody when this petition was filed and no direction was issued by this Court to the petitioner to surrender before the trial Court. Only a liberty was given to the petitioner to surrender before the trial Court. Petitioner is an 'absconder' and he is not entitled for concession of bail. The petitioner filed application under Section 439 Cr.P.C. for grant of regular bail before the lower court and interim bail was granted only on his request for settling the dispute with the complainant. Said bail application was dismissed vide order dated 01.06.2018. The petitioner was directed to surrender on 06.06.2018 but he did not appear on that date and thereafter a notice was issued by learned Magistrate to appear on 14.06.2018 but still he refused to receive the notice and did not appear on 14.06.2018 also. Thereafter, warrant of arrest was issued against him for 08.08.2018. Learned counsel also submits that the present petition was filed before this Court on 17.06.2018 and at that time, the petitioner was 'absconder' after dismissal of regular bail. The interim bail was obtained by the petitioner by making a false statement that he was ready to settle the dispute with the complainant. Petitioner surrendered before learned Magistrate on 09.07.2018 during pendency of this petition. Learned senior counsel for the complainant also submits that only under the

extraordinary circumstances, the petitioner can approach this Court for grant of regular bail but not in ordinary course as the petitioner was having remedy to file petition before the lower Court and this petition is not maintainable. Learned senior counsel also submits that the petitioner committed default himself in spite of direction issued to him and he was having remedy to approach the same court for recalling the order passed against him but no such remedy has been availed. The petitioner cannot be stated to be in custody as he was not in custody at the time of filing of this petition and, therefore, he cannot apply for regular bail. Learned senior counsel for the complainant further submits that the petitioner has intentionally suppressed the material fact as it has nowhere been mentioned in the petition about the earlier order whereby bail was declined to him. The petitioner has been declared absconder and warrants of arrest were also issued against him and under these circumstances, he is not entitled for regular bail. At the end, learned senior counsel for the complainant submits that the petitioner does not deserve concession of bail as not only he is playing fraud with the Court but he has suppressed the material facts and has not been brought to the knowledge of this Court. He has also mislead this Court and does not deserve the concession of bail. In support of his arguments, learned senior counsel has relied upon judgments of Hon'ble the Apex Court in cases ***Sunita Devi Vs. State of Bihar and another 2005(1) R.C.R.(Criminal) 410, Nirmal Jeet Kaur Vs. State of Madhya Pradesh and another 2004(4) R.C.R. (Criminal) 376, Adri Dharan Das Vs. State of West Bengal 2005(2) R.C.R. (Criminal) 32, Virupakshappa Gouda and***

another Vs. State of Karnataka and another 2017(2) R.C.R. (Criminal) 491, Moti Lal Songara Vs. Prem Prakash @ Pappu and another 2013(3) R.C.R. (Criminal) 333, Ramjas Foundation and another Vs. Union of India and others 2011(1) R.C.R. (Civil) 176, Dalip Singh Vs. State of Uttar Pradesh and another 2010(2) SCC 114 and Meghmala and others Vs. G. Narasimha Reddy and others 2010(8) SCC 383, judgment of this Court in case Naib Singh Vs. State of Punjab 1997(4) R.C.R. (Criminal) 643, judgment of Chhattisgarh High Court in case Prakash Patel Vs. State of C. G. 2015(2) C.G.L.J. 445 and judgments of Calcutta High Court in cases Bholanath Chatterjee Vs. State of West Bengal and another 2001(2) Callj 175 and Shamim Ahmed and others Vs. State and others 2003(4) R.C.R. (Criminal) 210.

Heard arguments of learned counsel for the parties and have also perused the contents of FIR and other documents on the file.

The FIR in dispute was registered on the basis of complaint made by Narender Bhadana, who is brother of the petitioner. As per the allegations in the FIR, some matrimonial dispute was there between the complainant and his wife. Petitioner accused instigated the complainant against his wife and after winning over his confidence, the complainant was kept under intoxication by making him to consume excess liquor. Thereafter, by taking advantage of his intoxication, the petitioner-accused with the help of other accused obtained his signatures on many papers and forged documents including the agreement to sell. When complainant received a legal notice dated 11.01.2017, he came to know about illegal act

and conduct of the accused persons by procuring agreement to sell dated 15.12.2014 relating to property measuring 19 Kanal 01 Marla situated within revenue estate of village Anangpur, Faridabad. After receiving the legal notice, the complainant filed a civil suit for cancellation of alleged forged and fabricated agreement to sell. Wife of the complainant also filed a case against the petitioner-accused where allegations of outraging of her modesty were there. It is also the allegation that due to excess consumption of liquor given by the petitioner-accused to the complainant and with *mala fide* intention to garb the property of the complainant, the agreement to sell was prepared and no amount was paid. The agreement to sell is forged, fictitious and false. Two pages of the agreement to sell were changed as in the first agreement the amount has been shown to be Rs.9,47,43,000/- and in the second, it was shown to be Rs.76,12,500/-. Out of said amount, nothing was paid to the complainant. The complainant came to know after receipt of the legal notice. Admittedly, the complainant has challenged the agreement to sell dated 15.12.2014 by way of filing civil suit on 24.12.2015 and FIR has been registered subsequently after a delay of more than one and half years i.e. 06.04.2017. It is also not disputed that earlier FIR No.649 dated 13.10.2016 under Sections 323, 506, 427 and 34 IPC was registered at the instance of petitioner against the complainant and his family members. The reply of the civil suit was filed. In para No.6 of the reply, the contents of the civil suit have been denied. It has also been mentioned in the reply that property has already been sold out to Devender Bhadana (petitioner) and one Ramjeet Singh and possession has also been handed over to them.

The complaint filed by wife of the complainant against the petitioner was found to be false in the inquiry conducted by Incharge Women Cell NIT, Faridabad.

Petitioner filed anticipatory bail before the lower Court which was dismissed. Thereafter, petitioner filed CRM-M No.35147 of 2017 before this Court for grant of anticipatory bail which was also dismissed on 08.12.2017. Thereafter, petitioner was arrested and remained in custody from 04.01.2018 to 21.02.2018. He filed petition for regular bail before learned Addl. Sessions Judge, Faridabad. During pendency of that petition, he was released on interim bail vide order dated 21.02.2018, after considering his submission that he was ready to settle the dispute with his brother/complainant Narender Bhadana. The parties did not settle their dispute and petition filed by the petitioner was dismissed vide order dated 01.06.2018 and he was directed to surrender before the Illaqa Magistrate on or before 06.06.2018. Petitioner did not surrender as per direction and notice was issued to him. Thereafter, order was passed on 14.06.2018 to procure presence of the petitioner through warrant of arrest for 08.08.2018. Now the petitioner has approached this Court by way of filing the present petition *i.e.* CRM-M No.26466 of 2018 for grant of regular bail to him. The case came up for hearing on 06.07.2018. However, learned counsel for the complainant has raised a preliminary objection that this petition is not maintainable as petitioner has not appeared before trial Court in spite of issuance of non-bailable warrants and has approached this Court directly. The petitioner is not entitled for regular bail as he is not in custody. The

case was adjourned to 11.07.2018. However, a liberty was given to the petitioner to surrender before the trial Court. The case was adjourned on various dates as either its number did not reach for hearing or request was made. Ultimately, the case was argued by learned counsel for the parties on 16.08.2018.

As per arguments of learned counsel for the petitioner, the petitioner surrendered before the trial Court as per liberty given to him. The petition was filed before this Court as the regular bail was dismissed by the trial Court and there was no justification to file the second petition before the trial Court. Earlier petitioner was on interim bail which was dismissed and, thereafter, liberty was given to him to surrender before the trial Court. It is also the argument of learned counsel for the petitioner that at the time of hearing of the petition he was in custody and petition for regular bail was maintainable. Learned counsel for the complainant has raised a preliminary objection that at the time of filing the present petition, petitioner was not in custody and even no direction was issued to him to surrender. The petitioner should have filed a petition afresh after surrendering before the trial Court. Petitioner has not challenged the order of cancellation of bail where remedy was available to him.

Section 439 Cr.P.C. relates to power of High Court and Court of Session regarding regular bail which is reproduced as under:-

“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 sub-section (3)

of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

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

The terms 'custody', 'detention' or 'arrest' have not been defined in the Cr.P.C. The Oxford Dictionary (online) defines custody as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress and durance. The Cambridge Dictionary (online) explains 'custody' as the state of being kept in person, especially while waiting to go to Court for trial. Longman Dictionary (online) defines 'custody' as when someone is kept in prison till they go to court, because of commission of any crime. Chambers Dictionary (online) clarifies that custody is 'the condition of being held by the police; arrest or imprisonment; to take someone into custody to arrest them'. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration. The Collins Cobuild English Dictionary for Advance Learners states in terms of that someone who is in custody or has been taken into custody or has been arrested and is being kept in prison

until they get tried in a court or if someone is being held in a particular type of custody, they are being kept at a place which is similar to a prison. The Shorter Oxford English Dictionary postulates the presence of confinement, imprisonment, duration and this feature is totally absent in the factual matrix before us. The Corpus Juris Secundum under the topic of 'Escape & Related Offenses; Rescue' adumbrates that 'Custody, within the meaning of statutes defining the crime, consists of the detention or restraint of a person against his or her will, or of the exercise of control over another to confine the other person within certain physical limits or a restriction of ability or freedom of movement.' This is how 'Custody' is dealt with in Black's Law Dictionary, (9th ed. 2009):-

"Custody- The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man's person by virtue of lawful process or authority.

The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. *U. S. ex rel. Wirtz v. Sheehan, D.C. Wis, 319 F.Supp. 146, 147*. Accordingly, persons on probation or released on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings."

On perusal of meaning of 'custody' as defined in various dictionaries, it discloses that the concept which has been created is to control of a person's liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person's freedom of action. While interpreting the expression 'in custody' within the meaning of Section 439 Cr.P.C., Krishna Iyer, J. speaking for the Bench in ***Niranjan Singh v. Prabhakar Rajaram Kharote*** (SCC p.563, para 9) observed that:

"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."

When a person is in custody within the meaning of Section 439 Cr.P.C., it is not necessary that he is in custody only after arrest by the police or he is produced before a Magistrate and gets 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 petitioner was in custody after arrest and he filed an application for grant of regular bail before the trial Court. He was released on interim bail by considering the submissions made by the petitioner that the dispute is between two brothers and he was ready to settle the same, but settlement could not mature as the complainant was not ready. Even in the arguments raised before this Court, learned counsel appearing for the petitioner submitted that the petitioner is still ready to settle the dispute with the complainant in case the amount paid by him to the

complainant is returned to him, but the complainant party is not interested in settlement. No doubt, the petitioner was not in custody when this petition was filed before this Court as his bail was cancelled by the trial Court and he was directed to surrender before the Illaqa Magistrate but instead of surrendering himself, the present petition was filed. The case was adjourned with liberty to the petitioner to surrender before the trial Court. For availing benefit of regular bail, the petitioner should be in custody. The petitioner was in custody as he surrendered before the trial Court prior to raising of the arguments. Subsequently, the argument that he was not in custody cannot survive. Petitioner remained in custody w.e.f. 04.01.2018 to 21.02.2018. Thereafter, he was released on interim bail on 21.02.2018, which was extended further from time to time. The application for regular bail was dismissed on 01.06.2018 and he was directed to surrender on or before 06.06.2018. No doubt warrant of arrest was also issued against him. Petitioner cannot be stated to be an 'absconder' as instead of surrendering on a particular date as directed, he filed a petition before this Court and thereafter, he surrendered before the trial Court after passing of the orders by this Court.

It is settled proposition of law that before declaring the accused as an 'absconder', the Court has to satisfy itself that the accused has left his permanent residence or is avoiding service or there is no chance of arrest in near future. Learned Magistrate has not proceeded in accordance with law as no such finding or evidence has been recorded. Section 299 Cr.P.C. is clear wherein it is mentioned that when an accused is declared absconder,

the Magistrate has to record the statement of the witnesses produced by the prosecution so that it can be read in evidence in the contingency shown in the Section itself. In the present case, neither any satisfaction has been recorded nor any finding has been given that the petitioner has avoided the service or his presence. No doubt a notice was issued at his given address and at any point of time the petitioner was not declared absconder by following the procedure laid down under Section 82 Cr.P.C. The trial Court has either to split up the trial or to take steps under Section 82 and 83 of Cr.P.C. to declare the accused as an absconded accused and to record the evidence against such absconded accused under Section 299 of Cr.P.C. After filing of charge sheet, the trial Court is to issueailable warrants, non-ailable warrants or to proceed under Section 82 and 83 Cr.P.C. to declare the accused as an absconding accused.

In the present case, not only the required procedure has not been adopted/followed but no efforts have been made to procure the presence of the accused-petitioner. In case the presence of the absconding accused is not secured despite making all efforts, he can be declared absconder by following the prescribed procedure. In case where only one accused is there in the case then notices are issued by the Court against the absconding accused to secure his presence and in spite of making all efforts, if the presence of accused is not secured thenailable warrants and, thereafter non-ailable warrants are issued if required. In case the presence of accused is not secured, proclamation under Section 82 Cr.P.C. is to be issued and, thereafter, to proceed further with the provisions of Section 83

Cr.P.C. After the proper procedure has been followed and recording satisfaction of the Court that accused is absconding then Court can declare the accused as an absconded accused and can proceed to record evidence under Section 299 Cr.P.C.

Petitioner has not been declared as an absconded accused as no such finding has been recorded and no such order has been passed. No doubt an accused who is not in custody cannot apply for regular bail under Section 439 Cr.P.C. A person is stated to be in custody who is under control of the Court or in the physical hold to an officer of the coercive power is in custody for the purpose of Section 439 Cr.P.C. By considering the word 'custody' it is also necessary to mention that two words are there i.e. actual imprisonment or physical detention. A person who is on probation or parole or released on bail or on own recognizance have been held to be 'in custody' for the purpose of habeas corpus. In case titled as ***K. L. Verma Vs. State 1997(1) RCR (Criminal) 493 (SC)***, the Court only indicated that time may be extended to "move" the higher court. In Black's Law Dictionary the said expression has been explained as under :

"Move: to make an application to a Court for a rule or order, or to take action in any matter. The term comprehends all things necessary to be done by a litigant to obtain an order of the Court directing the relief sought."

For making an application under Section 439 Cr.P.C., the fundamental requirement is that the accused should be in custody. The protection in terms of Section 438 Cr.P.C. is for a limited duration during which the regular Court has to be moved for bail. It clearly shows that such

bail is a bail in terms of Section 439 of the Code, which mandates the applicant to be in custody.

Now in the present case, the application for regular bail filed by the petitioner was dismissed only on the ground that he got interim bail to settle the dispute but there was no settlement. The settlement could be possible if both the parties were agreeing. It was the request on the part of the petitioner only to settle the dispute as complainant is his brother but complainant party was not ready. The trial Court should have decided the regular bail on merit instead of dismissing on technical grounds. Even a single word has not been stated on merits of the case. Neither the nature of offence nor the custody nor the fact that investigation has already been completed is mentioned in the order. Several litigations are pending between the parties. In one FIR registered at the instance of the wife of the complainant, certain allegations were levelled with regard to outraging her modesty against the petitioner but those allegations were found to be false in the inquiry conducted by the concerned police authority. All the allegations levelled in the FIR are matter of evidence and it is to be tested by the trial Court on the basis of evidence produced by the parties.

Accordingly, by considering the fact that the offences are triable by Magistrate, the petitioner has remained in custody for a period more than three months, investigation has been completed, challan has already been presented on 22.02.2018 and custodial interrogation of the petitioner is not required as he has already joined and cooperated in the investigation, the present petition is allowed. The petitioner is directed to be

released on regular bail on his furnishing bail/surety bonds to the satisfaction of the trial Court.

Dated: 24.08.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No