

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.389 OF 2020

Sushilabai Anna Kamble

... Appellant

Versus

The State of Maharashtra and others

... Respondents

.....

Mr. S. P. Bramhe, Advocate for appellant.

Mr. S. W. Munde, APP for respondent No.1 – State.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 18th September, 2020

ORDER :

. Present appeal has been filed under Section 14(A) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'Atrocities Act') to challenge the order dated 25-02-2020 passed by the learned Additional Sessions Judge / Special Judge, Jalgaon in Special Case No.7 of 2018 below Exhibit-13.

2. Present appeal has been filed by the original complainant who has filed the said private complaint which has been registered as Special Case No.7 of 2018 against present respondent Nos.2 to 16. The appellant has come with the case that she was elected as a member and, thereafter, Sarpanch of Borkhede

Pirache Village Panchayat. She is member of Scheduled Caste. Respondent Nos.2 to 16 are knowing the caste of the complainant. A serious offence was committed by original accused persons on 02-10-2015 which was within public view. She had approached Mehunbara Police Station and lodged Crime No.78 of 2015 which was then registered under Sections 143, 147, 149, 323, 504, 506 of Indian Penal Code, Section 3(1)(x) of the Atrocities Act and Section 37(3) punishable under Section 135 of the Bombay Police Act. The Deputy Superintendent of Police conducted the investigation and then filed B-summary report on 23-11-2015 before the learned Judicial Magistrate First Class, Chalisgaon. Thereafter, the informant had filed protest petition. Learned Judicial Magistrate First Class, thereafter, gave direction for further investigation by passing order on 01-03-2016. Again the investigating officer had submitted B-summary report on 11-06-2016. Again the present informant had filed protest petition. Thereafter, the matter was kept for recording verification of the complainant. It was found by learned Judicial Magistrate First Class, Chalisgaon on 26-06-2017 that he has no jurisdiction to entertain the complaint and, therefore, it was returned to the appellant for its presentation before appropriate Court by order dated 26-06-2017. The Miscellaneous Application No.6 of 2018 was filed by the complainant before the learned Special Judge under the Atrocities Act. Her verification was recorded, so also, statement of witnesses were recorded. On the basis of the same, the learned Special Judge issued

process against the accused persons by order dated 19-05-2018. The summons were returnable on 21-06-2018. As per the appellant, respondent Nos.2 to 16 had protracted the proceedings on one or the other pretext. They had not filed application for bail in time. Respondent Nos.2 to 16 had filed Criminal Application No.904 of 2018 before this Court challenging the order of issuing process. Ultimately, they withdrew that application on 29-03-2019. The accused persons were reluctant to appear before the learned Special Judge. They were not in judicial custody before the learned Special Judge. They were not even punctual to attend various dates those were given. Many adjournments were taken, but ultimately they filed application at Exhibit-13 on 04-08-2018 for bail. The applicants contended that they were never in judicial custody and, therefore, the appellant contested the application, however, the bail was granted. At the same time, a separate application was filed by the complainant at Exhibit-23 for taking the accused persons in judicial custody, after issuing non bailable warrant. That application was rejected. The appellant is challenging the said order below Exhibit-13, by which regular bail was prayed and then granted.

3. Heard learned Advocate Mr. S. P. Bramhe for the appellant and learned APP Mr. S. W. Munde for respondent No.1 – State. Taking into consideration the documents on record, it is not even necessary to issue notice to respondent Nos.2 to 16.

4. It has been vehemently submitted on behalf of the appellant that record would show that the Magistrate or the Special Judge had never taken the accused persons in judicial custody. After the complainant had filed the private complaint which has been now registered as Special Case No.7 of 2018, the legal procedure has been adopted. Verification of the complainant and the statements of witnesses were recorded and a detailed order of issuing process against the accused persons for the offences punishable under Sections 143, 147, 149, 323, 504, 506 of Indian Penal Code as well as Section 3(1)(x) of the Atrocities Act has been issued. The attempt to challenge the said order before this Court in Writ Petition No.904 of 2018 was not in favour of the accused persons as they have withdrawn that petition. Thereafter, when the summons was received by the accused persons, they appeared through Advocate and prayed for submission of bail, which was granted. Thereafter, on many dates on one or the other pretext, the accused persons have taken adjournments and exemption of certain persons. When the accused persons never appeared before the Court and had not submitted themselves to the jurisdiction of the Court, they were not entitled to be released on bail. In other words, the accused persons were never in judicial custody and, therefore, their application for bail was not maintainable at all. Ultimately, the complainant had filed application at Exhibit-23. She gave all the details regarding the case as to how the accused persons are not remaining present and then asked the Court to take the accused persons in judicial custody.

That application came to be rejected contending that the accused persons had surrendered before the Court and, therefore, they were entitled to file application under Section 439 of the Code of Criminal Procedure. The application for bail filed by respondent Nos.2 to 16 came to be allowed on the ground that there is no involvement of any muddemal property and there is no question of recovery of the same and, therefore, further custodial interrogation or simple custody of the accused persons is uncalled for. The learned Special Judge has taken the wrong view and, therefore, that order is challenged in this appeal.

5. The learned APP submitted that the accused persons ought to have filed application for bail immediately after the service of summons was effected on them.

6. At the outset, the crux of the matter are that whether the accused persons can be said to have been submitted to the jurisdiction of the Court and were in custody when they have been released on bail under Section 439 of the Code of Criminal Procedure. Here, in this case, after the process was issued, the accused appeared in the matter by filing an application on 21-06-2018. They prayed for grant of time to submit surety. That time was granted on that day and the said application is at Exhibit-12. No doubt, taking into consideration the further contents which can be said that the accused persons had taken much

time to furnish bail and have taken adjournments on one or the other pretext, but the fact remains that they had appeared before the Court and prayed for time to furnish surety. Since this is a private complaint, there could not have been a voice regarding police custody. The learned trial Judge has relied on the decision in *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and others*, [1980 AIR SC 785], wherein it has been held that “when the accused has surrendered before a Court, then it amounts to submitting to the custody of the Court.” In such cases, arrest by police is not necessary. Further, it is also held that “custody, in the context of Section 439 of the Code of Criminal Procedure is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court.” Further, this Court at the principal seat in *Ishan Vasant Deshmukh Vs. State of Maharashtra*, [2011 (2) Mh.L.J. 361] has dealt with the question “when is a person in custody, within the meaning of Section 439 of the Code of Criminal Procedure?”, which is the same question involved in *Niranjan Singh’s* case (Supra) and this Court had taken note of various pronouncements, especially in respect of *Niranjan Singh’s* case (Supra), and it has been observed that :-

“There can be no doubt as held in para 6 of the judgment in Niranjan Singh’s case that no person accused of an offence can move for bail under Section 439 of the Code of Criminal Procedure, 1978 unless he is in custody. But it is also clarified in para 9 that when a person surrenders before the Court and submits to its directions, he

is said to be in judicial custody and therefore, an application for bail would lie.”

7. The said case of **Niranjan Singh** (Supra) was again referred by this Court at principal seat in **Krushna Guruswami Naidu Vs. The State of Maharashtra, [Criminal Application No.1397 of 2009]** and went on to the extent that :-

“In my view, this question is no longer res-integre and the Apex Court in several cases held that the power of the Sessions Court and the High Court will not be restricted or limited in any manner as is evident from the provisions of Section 439 of the Criminal Procedure Code and, therefore, even if police remand has been granted by the Magistrate Court, during this period also an application under Section 439 is maintainable in the Sessions Court”.

8. Therefore, when the application was filed in this case on behalf of the accused at Exhibit-12 on 21-06-2018, in which it has been specifically stated that in view of the summons the accused persons are appearing in the matter before the Court and since they are unable to furnish surety, they be granted time, the learned Special Judge has accordingly granted time. This exercise amounts to submitting themselves to the jurisdiction and control by the Magistrate and, therefore, it amounts to the custody as contemplated under Section 439 of the Code of Criminal Procedure. Now, as regards grant of bail is concerned, the offences, those were alleged, were under Sections 143, 147, 149, 323, 504 and 506 of Indian Penal Code and all are bailable offences. Offences under Section 3(1)(x) of the Atrocities Act, though non bailable, the custody of the accused persons was not at all necessary and, therefore, by a detailed order, the

bail application has been rejected. There is absolutely no illegality or error committed by the learned Special Judge in granting the bail and, therefore, challenge to the said order is uncalled for. No case is made out to interfere with the said order. Hence, the appeal stands rejected.

[SMT. VIBHA KANKANWADI, J.]

scm