

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

***INTERIM APPLICATION NO. 1108 OF 2021
IN
CRIMINAL APPEAL NO. 1715 OF 2019***

M/s. Seair Impex Pvt. Ltd. & Anr. ...Applicants
Versus
M/s. Elfit Exports Pvt. Ltd. & Anr. ...Respondents

Mr. Anil C. Lalla i/b Lalla & Lalla for the Applicants

Mr. Karan Jain i/b Mr. Mohit Bhansali for the Respondent No. 1

Mr. P. H. Gaikwad-Patil, A.P.P for the Respondent No.2–State

CORAM : REVATI MOHITE DERE, J.
THURSDAY, 1st APRIL 2021

P.C. :

1 By this application, the applicants seek the following substantive prayer :

“A. That pending the Hearing and Final Disposal of Criminal Application (Leave to Appeal) NO. 229/2019, this Hon’ble Court be pleased to enlarge the Applicants on Bail on the same terms and conditions as granted by the Id. Magistrate, 43rd Court, Borivali u/s 437A CRPC while acquitting Applicants in CC No. 843/SS/2011.”

2 Learned counsel for the applicants submits that on 4th December 2019, this Court (Coram : Nitin W. Sambre, J.) granted leave to file appeal to the respondent No.1-M/s. Elfit Exports Pvt. Ltd. and admitted the appeal. Vide the said order, action under Section 390 of the Criminal Procedure Code ('Cr.P.C') was taken and direction was given that the accused be admitted to bail on the same terms and conditions on which he was ordered to be released by the Court below.

3 Learned counsel for the applicants submits that pursuant to the said order, the applicant No. 2 along with his Advocate filed an application to surrender along with a bail application. He submits that the Advocate Shri Tushar Londhe informed the Magistrate about the order dated 4th December 2019 passed by this Court and prayed that the applicant No.2 be enlarged on bail on the same terms and conditions as directed by the High Court vide order dated 4th December 2019. He submits that surprisingly the Magistrate, instead of complying with the directions of this Court, advised the applicant and his Advocate to move the High Court for bail and returned the application filed by the applicant to the Advocate, without passing any orders. He submits that the Advocate for the applicant once again requested the Magistrate to pass orders directing him to approach the High Court,

however, the Magistrate rose for his lunch break and did not take the application on record. The submission of the learned counsel for the applicants has also been mentioned in the application in para 3 of the application. According to the learned counsel for the applicants, since the Magistrate refused to accept the application pursuant to the order dated 4th December 2019, the applicant is constrained to file the aforesaid application seeking bail, pending the hearing and final disposal of the aforesaid appeal. Learned counsel relied on the judgment of the Division Bench of this Court in the case of ***Farooq Abdul Gani Surve vs. The State of Maharashtra*** passed in Criminal Application No. 1087 of 2011 in Criminal Appeal No. 315 of 2007, in particular, para 5 of the said order.

4 Learned A.P.P does not dispute the fact that the Magistrate could not and ought not to have refused to accept the application filed by the applicant pursuant to the order passed by this Court on 4th December 2019.

5 Perused the papers. The applicants are the original accused, who were facing prosecution in the Court of the Metropolitan Magistrate, 43rd Court at Borivali, Mumbai, for the alleged offences punishable under Sections 138 r/w 141 of the Negotiable Instruments Act (CC No.

843/SS/2011). The respondent No. 1 is the original complainant. After trial, the applicants were acquitted of the offences punishable under Section 138 of the Negotiable Instruments Act. Being aggrieved by the judgment and order of acquittal passed by the learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai, the respondent No. 1 filed an application seeking leave to file appeal i.e. Criminal Appeal No. 229 of 2019. On 4th December 2019, this Court (Coram : Nitin W. Sambre, J.) passed the following order :

- “*Heard.*
2. *Leave to appeal is granted.*
 3. ***Admit.***
 4. *Action under section 390 of the Criminal Procedure. Accused be admitted to bail on the same terms and conditions on which he was ordered to be released by the Court below.*
 5. *Call for record and proceedings.*
 6. *To be heard along with Criminal Application No.59 of 2019.”*

6 The order is clear. It specifically states that the accused be admitted to bail on the same terms and conditions, on which he was ordered to be released by the Court below. The Magistrate could not have refused to entertain an application filed by the applicant seeking his enlargement on bail pursuant to the said order dated 4th December 2019. The Division Bench of this Court in the case of ***Farooq Abdul Gani Surve vs. The State of Maharashtra (supra)***, in para 5, issued certain directions. The object of

Section 390 Cr.P.C is to ensure that an acquitted person does not abscond during the pendency of an appeal filed against his acquittal. This Court observed that there was no impediment to release such persons who were acquitted during the pendency of their appeal against acquittals. The Division Bench of this Court in the said judgment, in para 11 referred to the judgment of this Court in the case of ***State of Maharashtra vs. Bapu Pandu Mali – 2010 All MR (Cri) 120***, in particular, paras 5 and 6, which read thus :

“11.

5. After hearing the learned amicus curiae and the learned Additional Public Prosecutor, we give the following directions:

That in case of warrant under Section 390, the Sessions Judge, on production of the persons, shall immediately offer him bail on conditions which are just and proper, and in appropriate cases, the Sessions Judge may also consider release of such persons on personal bond. However, if he learned Sessions Judges are of the view that the surety is not produced or surety is not sufficient, they would remand the persons to the prison. In that case, they should inform the High Court immediately that the person has been remanded to the custody in case originally, the warrants are issued by the High Court.

6. We are told that such directions were given in year 2004 also, but the learned Sessions Judges have not been following these directions. Therefore, in case, in future, any Sessions Judge is found not to follow the directions, besides taking departmental action against such learned Sessions Judge, he shall also be liable to contempt of this Court."

(emphasis supplied)

It would also be relevant to reproduce para 12 of ***Farooq Abdul Gani Surve vs. The State of Maharashtra (supra)***, which reads as under :

“12. We are, therefore, constrained to issue similar directions to the Sessions Court. We have been told that though orders which are passed by the Supreme Court and this Court are shown to the Sessions Court, without justifiable reasons or recording any reasons in writing, directions given by this Court are not followed. It is, therefore reiterated that, in case, in future, if any Sessions Judge is found not to follow the directions, besides taking administrative action against such learned Sessions Judge, he shall also be liable for contempt of this Court.”

7 It is evident from the aforesaid that the Magistrate could not and ought not to have refused to entertain the bail application filed by the applicant. Having regard to the aforesaid, it would be better to relegate the matter back to the Magistrate for complying with the said directions issued by the Division Bench of this Court in the case of ***Farooq Abdul Gani Surve vs. The State of Maharashtra (supra)***. On an application being filed by the applicant, seeking his enlargement on bail, the learned Magistrate shall forthwith pass orders on the same and release the applicant on bail on the same terms and conditions on which he was ordered to be released by the Court.

8 At this stage, learned counsel for the applicant states that he will file an appropriate application before the trial Court between 6th and 8th April 2021.

9 In the meantime, the learned Magistrate to give an explanation as to why the Division Bench judgment in the case of ***Farooq Abdul Gani Surve vs. The State of Maharashtra (supra)*** has not been complied with and why despite the order dated 4th December 2019 being clear i.e. asking the Court to release the applicant on bail on the same terms and conditions as was directed earlier, has not been complied with.

10 Learned Magistrate to give his explanation on or before 21st April 2021 in a sealed envelope through the Registry.

11 The application is disposed of on the aforesaid terms, however, the matter is kept for recording compliance of the order dated 4th December 2020 as well as for obtaining the explanation of the learned Magistrate on 23rd April 2021.

12 Registry to communicate this order by fax/email/special messenger to the learned Metropolitan Magistrate, 43rd Court at Borivali, Mumbai, forthwith.

13 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.