
(2012) 10 BOM CK 0237

In the Bombay High Court

Case No : Criminal Bail Application No. 265 of 2012 in Criminal Appeal No. 812 of 2011

Balkrishna Mahadev Lad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Constitution of India, 1950 — Article 21
Contempt of Courts Act, 1971 — Section 2(a), 2(b), 2(c)
Criminal Procedure Code, 1973 (CrPC) — Section 378, 390, 427, 437A
Judges (Protection) Act, 1985 — Section 3

Citation : (2012) BomCR(Cri) 300

Hon'ble Judges : Savant R.M., J;Kode P.D., J;Khanwilkar A.M., J

Bench : Full Bench

Advocate : R.A. Shaikh with Satish Kotian, for the Appellant; Revati Mohite Dere, Public Prosecutor with Ms. U.V. Kejariwal, Assistant Public Prosecutor, for the Respondent

Judgement

Khanwilkar A.M., J.—This matter has been referred to the Pull Bench, pursuant to the order passed by the Division Bench of Mr. Justice A.S. Oak and Mr. Justice A.V. Potdar on 29th February, 2012, Balkrishna Mahadev Lad Vs. State of Maharashtra, . The said Division Bench was of the opinion that the view expressed in the decision of another Division Bench of this Court (Bilal Nazki as he then and A.R. Joshi, JJ.) in the case of [State of Maharashtra Vs. Bapu Pandu Mall) , 2009 (3) Bom.C.R.(Cri.) 528 : 2010 All. M.R.(Cri.) 120 and followed in the subsequent decision of another Division Bench of this Court (V.M. Kanade and A.M. Thipsay, JJ.) in the case of Farooq Abdul Gani Surve Vs. State of Maharashtra, was in conflict with the purport of section 390 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") and in particular the exposition of the Apex Court in the case of State of U.P. Vs. Poosu and Another, and Amin Khan Vs. State of Rajasthan and Others, which decisions were not brought to the notice of the Division Bench in the case of Bapu Pandu Mali (supra). Having taken that view, the Division Bench of Justice Oak and Justice

Potdar formulated questions for consideration by a Larger Bench of this Court. The said questions read thus:

(a) When in an appeal against acquittal an action of issuing warrant for arresting the accused is directed in accordance with section 390 of the Code of Criminal Procedure, 1973, whether the accused is entitled to bail as a matter of right and whether the learned Sessions Judge before whom the accused is brought has no power to direct that the accused shall be committed to prison till disposal of the appeal?

(b) Whether this Court has power to direct that every breach committed by Sessions Judge of the direction issued by this Court will always constitute contempt of this Court?

In the reference order, the Court has analysed the two previous decisions of the Division Bench referred to above. It found that keeping in mind the purport of section 390, it would appear that judicial discretion could be exercised by the High Court on the question of issuance of bailable or non bailable warrant against the acquitted accused, at any stage of the appeal against acquittal. Further, the provision confers discretion on the Court, before whom the accused is brought, either to commit him to prison or to admit him to bail, pending disposal of the appeal. Therefore, the exposition in the case of *Bapu Pandu Mali* (supra) and *Farooq Surve* (supra) of the earlier Division Benches was contrary to the express language of section 390 of the Code as well as the decisions of the Constitution Bench of the Apex Court in the case of *Poosu* (supra) and in the case of *Amin Khan* (supra). In the reference order, the Division Bench has disagreed with the opinion of the earlier two Division Benches that the subordinate Court will have no option but to grant bail.

2. It then went on to consider the direction issued in the earlier two decisions of the respective Division Benches to the effect that if Sessions Judge fails to follow the directions so issued, in that case, he shall be liable for contempt action. In the reference order, the Division Bench has noted that it is well settled that breach of an order of a Court will constitute civil contempt if and only if the breach is deliberate or willful. Every breach is not a civil contempt. As a result of difference of opinion on these two issues the Court formulated two questions referred to above, in the reference order.

3. We have heard Counsel for the parties. Before we proceed to answer the two questions referred to the Larger Bench, we may first advert to the decision in the case of *Bapu Pandu Mali* (supra). This decision was rendered on 1st September, 2009, before coming into force of section 437A of the Code. In that case, the Court: noticed that although the accused was acquitted in the year 2003, he continued to remain in jail because of pendency of appeal against acquittal, filed by the State, in which, this Court had issued a warrant of arrest u/s 390 of the Code. Pursuant to the order issuing warrant of arrest, the Sessions Court called upon the accused to provide surety, which, the accused could not furnish and

therefore continued to remain in jail. The accused was arrested in connection with the crime on 30th March, 1999 and throughout during the trial, remained in jail, as he could not get bail. As a result of filing of appeal against acquittal, the accused continued to remain in jail. In the backdrop of this factual matrix, the Court examined the issue and opined that an accused, acquitted of the criminal charges, by a Court of law, should not remain in jail, even for a day, after acquittal, unless the order of acquittal is reversed by the Appellate Court. The Court then went on to observe as follows:

4. We have perused section 390 of the Criminal Procedure Code, which section only lays down a mechanism by which it is ensured that an acquitted person does not abscond while an appeal is filed against his acquittal. Therefore, we do not feel that there should be any impediment for the courts to release the persons who are acquitted during the pendency of the appeals against acquittal.

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

That in case of a warrant u/s 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 the 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 because 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 for contempt of this Court.

4. Notably, the abovesaid observations have been made without referring to the legal position expounded by the Apex Court in the case of Poosu (supra). Indubitably, a person who is acquitted of the criminal charges, by a Court of law, should not remain in jail even for a day after acquittal. But, that does not necessarily follow that the subordinate Court, before whom the acquitted accused is produced, in connection with the order passed by the High Court in an appeal against his acquittal, cannot commit him to prison even if the fact situation so warrants.

5. The dictum contained in paragraph 4 that, section 390 of the Code lays down a mechanism by which it can be ensured that an acquitted person does not abscond while an appeal is filed against his acquittal is unexceptionable. However, in the next sentence in the same paragraph the Court observed that there should be "no impediment" for the courts to release the persons who are acquitted during the pendency of the appeals against acquittal. Ostensibly, this

observation presupposes that there is discretion in the Court, before whom the accused is produced pursuant to the order of the High Court, for compliance of action u/s 390 of the Code. The difficulty, however, arises because of the first part of the direction contained in Paragraph 5, which gives an impression that there is no discretion whatsoever in the subordinate Court but to forthwith release the accused on bail. In that, in Paragraph 5, the opening part of the direction postulates that the Sessions Judge "shall" release the accused produced before him, pursuant to warrant u/s 390 of the Code, on bail and including on Personal Bond. The second part of Paragraph 5 reiterates that the Sessions Judge will have no option but to release the person on bail, on furnishing adequate surety. Further, it is only when the accused fails to furnish adequate surety, he must be remanded to prison but in that case, the judge is obliged to inform the High Court immediately about such remand. We need not dilate on the later part of the direction given to the Judges of the Sessions Court that they must immediately inform the High Court that the person has been remanded to custody. For, the warrants against the accused were issued pursuant to the order of the High Court, for initiating action u/s 390 of the Code. The only issue is about the direction contained in the first part of Paragraph 5 and the observation in Paragraph 4, which gives an impression that the Sessions Judge has no discretion but to release the accused on bail, as soon as he furnishes sufficient security or personal bond.

6. Having said this, we may now immediately turn to the decision of the Constitution Bench Of the Apex Court, in the case of Poosu (*supra*). That decision has analysed the purport of section 427 of the old Criminal Procedure Code, which is *pari materia* as section 390 of the new Code. The Apex Court, following the earlier precedents, has taken the view that even before advent of section 427 of the old Code, it has been the consistent judicial practice that the Court, pending the appeal against the order of acquittal, to secure the attendance of the accused person, would issue bailable or non bailable warrants. That power has been held to be inherent power of the Court, which was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on it by the Code. With the enactment of provision such as section 390 of the Code, that position has been made explicit. Section 390 of the Code reads thus:

390. Arrest of accused in appeal from acquittal. When an appeal is presented u/s 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail.

7. A bare perusal of this provision leaves no manner of doubt that the High Court is expected to exercise its judicial discretion on case to case basis to issue a warrant (bailable or non-bailable) directing that the accused be arrested and brought before it or be produced before the subordinate Court for compliance

thereof. The opening part of this section makes it amply clear that the judicial discretion can be exercised at any stage, after the presentation of the appeal u/s 378 of the Code. Thus, presentation of such appeal is a sine qua non for exercise of this judicial discretion, in terms of section 390 of the Code.

8. Reverting to the other facet of this provision, when an accused is acquitted by the subordinate Court, after a fullfledged trial, the High Court, while issuing direction in exercise of powers u/s 390 of the Code, may, in a given case, issue "bailable warrants" directing production of the accused before it or the subordinate Court for compliance thereof. If the accused is produced before the subordinate Court, pursuant to such "bailable warrants" issued by the High Court, the subordinate Court may release that accused on bail on terms and conditions which must be just and proper to secure the presence of the accused. Indeed, if the accused is unable to fulfill the terms and conditions for release on bail, the subordinate Court will be justified in directing committal of the accused to prison. However, he must soon thereafter intimate that fact to the High Court. Notwithstanding the power given to the subordinate Court u/s 390 of the Code, it cannot direct that the accused be committed to prison even if he is capable of and willing to abide by the terms and conditions of bail. Further, if the High Court in its order issuing "bailable warrants" has already spelt out the terms and conditions then the subordinate Court cannot add to or relax such conditions, but is expected to ensure compliance of those directions of the High Court.

9. Similarly, if the High Court were to issue "non bailable warrants" recording reasons indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison.

10. The Sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail, pending the disposal of the appeal. In other words, if the High Court, in its order, merely directs initiation of action u/s 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may be deem fit keeping in mind that the same are essential to secure the presence of the accused when required in the pending appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters and, inter alia, keeping in mind the question, as to whether releasing the accused on bail would not hamper securing his attendance pending the disposal of the appeal against acquittal in the High Court.

11. The Apex Court, in the case of Poosu (supra) has opined that it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion must be exercised. By way of illustration, the Apex Court has referred to factors such as, the nature and

seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and the State. As regards the High Court, while issuing a bailable or non bailable warrant, it also has to take into consideration the period during which the proceedings against the accused were pending against the accused in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in the High Court. The Apex Court has noted that directing rearrest of the accused, even when the appeal against acquittal is still pending for disposal or committing the accused to prison, does not in any way offend Article 21 or any other fundamental right guaranteed in Part III of the Constitution of India. For, it does not deprive the accused of his liberty in a manner otherwise than in accordance with the procedure established by law.

12. We are of the considered opinion that section 390 of the Code cannot be read to mean that the Sessions Judge, On production of the accused, has no option but to immediately release him on bail. Instead, we hold that the subordinate Court before whom the accused is produced pursuant to warrant issued in terms of order of the High Court, must exercise his judicial discretion on case to case basis and in particular keeping in mind the order of the High Court, passed in the pending appeal against acquittal in that regard. This would presuppose that the Sessions Judge, in appropriate case, can commit the accused to prison till the disposal of the appeal. Indeed, in that case, it will be open to the accused to question that decision of the Sessions Judge, before the High Court, in which proceedings, the High Court may consider the claim of the accused for grant of bail. Thus understood, grant of bail by the subordinate Court is not a matter of right.

13. As regards the decision of another Division Bench in the case of Farooq Surve (supra), it has essentially followed the earlier decision of the Division Bench in the case of Bapu Pandu Mali (supra). For the reasons already recorded, while considering the efficacy of the exposition in the case of Bapu Pandu Mali (supra), the same would apply proprio vigore to the later decision. In the later case, the accused was acquitted of the criminal case, The state preferred appeal against 20/12(4) acquittal. As the accused was not found at his earlier address, a non bailable warrant was issued against him by the High Court. The accused, on learning about the issuance of non bailable warrant, moved application before the High Court for recalling the said order and to grant him bail, pending the hearing and final disposal of the appeal. The order issuing non bailable warrant, against the accused, was set aside and the accused was ordered to be released on bail, on executing Personal Bond in the sum of Rs. 5,000/-, before the trial Court. The Court, however, proceeded to examine the general grievance made by the Counsel for the petitioner about the injustice caused in some cases because of the arrest of accused inspite of acquittal and continue to languish in jail. On that submission, the Court proceeded to issue directions to the subordinate courts to ensure that the accused, who are acquitted by the trial Court, should not continue to languish in jail as it results in violation of Article 21 of the

Constitution of India. As aforesaid, the Constitution Bench of the Apex Court, in Poosu (supra) has held that detention of the accused on account of order of the Court directing his arrest in no way offends his right guaranteed under Article 21 of the Constitution.

14. In Paragraph 9 of reported decision in Farooq Surve (supra), the Court went on to observe that the accused is entitled to be released on bail as a matter of rule. That wide observation, with due respect, is not the correct statement of law. The Court then noted that if the accused produces relevant documents regarding the proof of his residence and ownership of the property, he is entitled to be released on bail. This observation, therefore, cannot be understood to mean that the Sessions Judge has no discretion in the matter, but is obliged to grant bail upon production of the accused before it pursuant to order of the High Court, initiating action u/s 390 of the Code. Indeed, in the second part of this Paragraph, the Division bench went on to observe that the Sessions Court should remember that there is all the more reason to immediately release the accused after he is produced before it and his further detention would certainly be viewed as a breach of his fundamental right under Article 21 of the Constitution of India. This statement is in the teeth of the exposition of the Constitution Bench of the Apex Court, in paragraph 14, in the case of Poosu [supra]. The Division Bench has taken notice only of Paragraph 7 to 10 of the said decision and has not referred to Paragraph 14 thereof. Notably, in Paragraph 11 of the reported decision, the Division Bench has observed that the warrant issued pursuant to the order of the High Court u/s 390 of the Code, need not necessarily be a non bailable warrant. There is no difficulty in accepting this part of the statement but, the Court has gone farther to make a wide observation, which is neither consistent with the purport of section 390 of the Code nor the exposition of the Constitution Bench of the Apex Court in the case of Poosu (supra) and another decision of the Apex Court in the case of Amin Khan [supra].

15. After having adverted to the previous decisions of the Division Bench and the case of Poosu (supra), the Court in the case of Farooq Surve (supra), went on to observe 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.

13. The presence of accused can also be secured in the following manner:

(i) Name and address of the accused shall be taken on record at the time of pronouncement of judgment by the trial Court.

(ii) The accused should submit his local address where he would reside after

Order of acquittal as well as address of his native place.

(iii) Declaration of place of residence should be made and proof of it, if any, may be supplied. No insistence should be made about proof of residence if particulars are given.

(iv) The accused - respondent should furnish the address of his near and dear relatives.

(v) The accused be also directed not to leave India without the prior permission of this Hon'ble Court.

(vi) Under certain circumstances, the accused be directed to furnish the details of his passport and /or passport be deposited with the prosecution agency for a period of six months.

(vii) The accused may also be released on his executing the same P.R. Bond and Surety Bond if the accused were on bail pending trial.

(viii) If the accused is not on bail pending trial then he may be released forthwith on P.R. Bond and time be granted to him to furnish surety to the satisfaction of the trial Court.

(ix) The trial Court may also release the accused on cash bail in appropriate cases and/they may be directed to furnish surety within a reasonable period.

16. We have already analysed the decision in the case of Bapu Pandu Mali (supra) in extenso and for the reasons recorded earlier, we reiterate that section 390 of the Code predicates that not only the High Court has discretion to issue a warrant directing arrest of the accused and to be produced before it or before any subordinate Court but also bestows judicial discretion in the subordinate Court, before whom such accused is produced, to commit him to prison, pending the disposal of the appeal Or admit him to bail. The right of bail does not inhere in the accused, though has succeeded in getting acquittal from the trial Court. Both the High Court as well as the subordinate Court have to exercise judicial discretion on case to case basis.

17. As a matter of fact, after introduction of section 437A w.e.f. 31st December, 2009, the trial Court, at the conclusion of the trial, or the Appellate Court including the High Court before disposal of the appeal, as the case may be, is duty bound to ensure that the accused must execute bail bond to appear before the Higher Court and such bail bond must be kept in force for six months. Section 437A, as introduced by the Act 5 of 2009, reads thus:

1[437-A. Bail to require accused to appear before next appellate Court.- (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six

months.

(2).....

18. This provision reinforces that even if the trial Court or the Appellate Court, as the case may be, is inclined to acquit the accused, it has to ensure that the accused must execute a bail bond with surety to appear before the Higher Court and this bail bond must be kept in force for six months. The period of six months is specified in anticipation that the appeal against acquittal would be filed, either by the State or the victim/complainant, within such period and if the appeal against acquittal is filed, the accused would make himself available in the said proceedings.

19. Accordingly, we hold that the accused is not entitled to bail as a matter of right merely because he has been acquitted. Further, the subordinate Court, before whom the accused is produced, has judicial discretion to direct the accused to be committed to prison or to admit him to bail keeping in mind the order of the High Court, pending disposal of the appeal. Indeed, that judicial discretion has to be exercised in consonance with the settled parameters.

20. That takes us to the second question referred to for consideration. The Division Bench in the case of *Bapu Pandu Mali (supra)*, in Paragraph 6, has noted that if the Sessions Judge does not follow the directions contained in the said decision, besides taking departmental action, he shall also be liable for contempt of this Court. This observation has been restated by another Division Bench in the case of *Farooq Surve (supra)* (see Paragraph 12). In both these decisions, reference is made to the fact that similar decisions were issued by the Division Bench of this Court in the past. That observation is made presumably on the basis of the dictum of the Division Bench of this Court (*H.L. Gokhale, as His Lordship then was and S.S. Parkar, JJ.*). In the case of *Prema Bangar Swamy Vs. State of Maharashtra and Others*, . In that case, broadly three questions were considered by the Court. The question No. 3 was, whether any guidelines with respect to section 390 of the Code are required. In the context of that question, the Court observed thus:

25.....Now as the section reads, in an appeal from acquittal when an accused is arrested and brought before the subordinate Court it is for the accused to apply for bail. It is quite possible that out of lack of adequate knowledge or financial difficulties or various reasons that in spite of an acquittal in his favour an accused may not apply for bail. Some such thing appears to have happened in the present case. In our view in all such matters where an accused is produced before the subordinate Court after his rearrest the Judge concerned ought to inform the accused that he has a right to apply for bail. Thereafter it will be for the accused to make the appropriate application.

(ii) We are told that the consequence of any such bail application or even non-presentation thereof is reported by the Judge concerned to the High Court subsequently. Thus the communication reaches the High Court as to whether the

accused has been granted bail or the same has been refused. In our view, once such communication is received from the subordinate Court the Administration of the High Court must find out as to whether the accused has been granted bail or has been denied it and whether he is continued in custody. In all such matters it would be desirable that the High Court Administration places the paper of the concerned appeal before the appropriate Court with a note that after the arrest of the accused subsequent to the admission of the appeal against the acquittal, accused has been taken in custody. On noting this development it will be for the concerned Court thereafter to pass appropriate order. That will be one more opportunity to see to it that unnecessary retaining the accused in custody in spite of acquittal by the trial Court is avoided and the person concerned can be released on a bond.

(iii) These two directions will take care of such situation which has arisen in the present matter. This is only to see to it that there is no further occurrence of such situation which will be most unfortunate to say the least. 26.

(i) We further direct that a copy of the writ containing operative part of the order passed by the High Court to be sent to the person in custody wherever he or she has not engaged any Advocate of their own and are represented by a Court appointed Advocate. This is to be done forthwith when the writ is sent down to the concerned subordinate Court.

(ii) Similarly in all cases where the person is in custody a copy of the judgment will also be sent to him/her free of cost wherever such person is not represented by an Advocate of his or her choice. The copy of the judgment will be sent at an outer side within three months from the date it is received by the office.

21. While considering the second referred question, it is not necessary for us to examine the efficacy of the above directions. The issue that needs to be considered is, whether infraction of direction given by the High Court in the case of Bapu Pandu Mali (supra) and Farooq Surve (supra) would, *per se*, constitute contempt of this Court. What constitutes contempt can be traced to the provisions of Contempt of Courts Act, 1971. Section 2(a) postulates that contempt of Court means civil contempt or criminal contempt Civil contempt has been defined in section 2(b) of the Contempt of Courts Act, 1971, which reads thus:

2.(b) "Civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

22. On the other hand, criminal contempt has been defined in section 2(c) Contempt of Courts Act, 1971, which reads thus:

2.(c) "criminal contempt" means the publication(whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

- (i) scandalised or tends to scandalise, or lowers or tends to lower the authority of, any Court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner,

23. Our attention was invited to the decision of the Division Bench of this Court in the case of *Legrand (India) Private Ltd. Vs. Union of India (UOI) and Others*, . In that case, the Court held that inspite of earlier exposition of law of the High Court having been pointed out and attention being pointedly drawn to that legal position, "in utter disregard" thereof, proceedings were initiated. That act was held to constitute willful disregard of law laid down by the High Court and amounted to civil contempt as defined in section 2(b) of Contempt of Courts Act, 1971. Our attention was also drawn to the case of *Shri Baradakanta Mishra Ex-Commissioner of Endowments Vs. Shri Bhimsen Dixit*, wherein the Apex Court has held that subordinate Court or Tribunal "refusing" to follow the High Court decision where a petition for leave to appeal to Supreme Court against that High Court decision was pending, amounted to deliberate disobedience and willful disregard of the High Court and is contempt of Court. In a recent case of *Rabindra Nath Singh Vs. Rajesh Ranjan @ Pappu Yadav and Another*, the Apex Court held that inspite of clear order passed by the Apex Court that no further bail application of the accused shall be entertained, the High Court granted bail to that accused, which act amounted to contempt of order of the Apex Court.

24. It is not necessary to multiply authorities on this issue except to observe that unless the act of commission or omission is established to be willful and/or is replete with mens rea, it would not constitute contempt of Court.

25. Whether it is a civil contempt or criminal contempt, the quintessence, is, that the breach must be a willful breach or willful disobedience or replete with mens rea. If the Judge of the subordinate Court were to commit some error in discharge of his/her official or judicial duty or functions, that per se cannot be the basis to proceed against the judicial officer. It may be apposite to advert to section 3 of the Judges (Protection) Act, 1985, which opens with non obstant clause. It gives additional protection to the judges in this behalf. Section 3 of the said Act reads thus:

3. Additional protection to Judges.- (1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.

(2) Nothing in sub-section (1) shall debar or affect in any manner the power of

the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge."

25-A. Indeed, sub-section (2) of section 3 is an exception to the general Rule specified in sub-section [1] of section 3 of the Act, which enables the specified Authority including the High Court to take such action (whether by civil, criminal or departmental proceedings or otherwise) against any person who is/was a judge. The jurisdiction of the Supreme Court and High Court to initiate contempt action is sui generis. It inheres in the Court of records. But, at the same time, failure to comply with any direction issued by the High Court about the procedure to be adopted post committing accused to prison and rejecting his prayer for bail, which is required to be complied with utmost dispatch as it brooks no delay, per se, would not warrant action for civil or criminal contempt. That, however, would depend on the facts of each case. Unless it is noticed that the disobedience or committing breach was willful or replete with mens rea, as the case may be, it will not be just and proper to proceed against the judicial officer.

26. A priori, the second question posed and referred to us will have to be answered in the negative. In other words, it is not as if the Judge of the subordinate Court can be proceeded for any or every breach of direction of the High Court as constituting contempt of the Court but, it is only when the breach is found to be willful and involves mens rea, it may be open to initiate contempt action against such judicial officer. After having answered the two questions referred to us, ordinarily, we ought to send back the matter for being placed before the Appropriate Bench to proceed on merits. However, we have noticed that the application, in which reference order has been made, was only for grant of bail to the applicant, against whom warrant u/s 390 of the Code was executed. The Court, by the reference order dated 29th February, 2012 has already considered that relief on merits and has enlarged the applicant on bail on terms and conditions referred to therein. As a result, nothing survives for consideration in the present application. The same be treated as disposed of.