
(1998) 05 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 3222 of 1998

Kalachand Patel and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 14-05-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 439

Citation : (1999) ILR (MP) 628 : (1998) 2 MPJR 426 : (1999) 1 MPLJ 233

Hon'ble Judges : Ramesh Surajmal Garg, J

Bench : Single Bench

Advocate : Prashant Mishra, for the Appellant; Naidu, for the Respondent

Judgement

R.S. Garg, J.

It appears that the applicants apprehending their arrest by Police, Kunkuri (Raigarh) approached this Court u/s 438, Criminal Procedure Code. This Court being satisfied granted a protective order u/s 438, Criminal Procedure Code for a period of one month and directed that the applicants shall surrender and apply for regular bail which shall be decided on its own merits. It appears that the applicants thereafter surrendered before the Court trying the case of the co-accused but the learned Judge refused to consider their case observing that neither they were accused before him in some trial nor a supplementary challan was filed against them. These applicants again approached this Court in M. Cr. C. No. 2229/97. This Court extended the earlier period for one month and again directed that the applicants may obtain a regular bail from the regular Court. The applicants again appeared before the said Court and moved an application within the period fixed by this Court. The learned Magistrate rejected that application observing that as they were not accused before him in any case nor a challan/supplementary challan was filed against the present accused, therefore, it was not possible for him to consider the prayer for regular bail.

It appears that the learned Judicial Magistrate First Class has not cared to apply

his mind to the facts of the case. Anticipating arrest, when a person/applicants approach to this Court for grant of anticipatory bail, the Court considering such application has to consider it differently. In one case it may grant bail that in the event of arrest he be immediately released and, in another case the period of bail may be fixed for a limited period and in that limited period, he has to apply to the said Court/Competent Court for grant of a regular bail. In the first eventuality, ordinarily there would be no problem because it is not for a limited period and the accused is entitled to furnish bail to the satisfaction of the officer arresting him. The accused can also appear on intimation before the Court and furnish regular bail. In case of second type, where the bail is for limited period and the higher Court directs that the accused within the period of protective order shall apply for regular bail, then it simply means that the applicant/accused is required to move an application u/s 439, Criminal Procedure Code, before the said Court. Though the accused is not in custody nor can be taken in custody because of the protective order issued by the High Court u/s 438, Criminal Procedure Code but the moment he appears in the said Court and moves an application u/s 439, Criminal Procedure Code, then the Court would take him in custody for the purposes of such application and such custody would be deemed to be proper custody for an application u/s 439, Criminal Procedure Code. If the Court is satisfied that the case is fit for granting regular bail to such applicant/accused, then it would so direct and on submission of personal and bail bond the accused would be let off, but in case where the Court does not consider it to be a fit case for grant of an order u/s 439, Criminal Procedure Code then while rejecting the application, it cannot take the accused in actual physical custody if the protective order remains in force on that date. To clarify it further, though the Court has taken the accused in custody for the purpose of Section 439, Criminal Procedure Code but while rejecting his application for grant of regular bail, he cannot be taken in actual physical custody because the order passed u/s 438, Criminal Procedure Code protects him and directs the police and the said Court that he should not be taken in custody or if taken in custody such man would immediately be released.

The present appears to be a case of second type where the High Court granted bail for a limited period and directed the accused to move an application for regular bail. Once such a direction is issued by the High Court that within that period, he shall apply for regular bail. The Court otherwise having jurisdiction cannot say that because the matter is not pending before the Court or because challan/supplementary challan has not been filed against such accused, the application for grant of regular bail would not be considered. The learned Judge has failed to appreciate that while making such observations, he was perilously bordering contempt of the lawful authority of this Court. Once the High Court orders that the application of the accused filed u/s 438, Criminal Procedure Code is allowed and a protective order is granted in his favour for a limited period and such accused is required to move for regular bail, then the Court subordinate to the High Court is duty bound to consider the said application on merits of the

matter. It appears that the learned Judicial Magistrate First Class lost sight of the fact that the High Court in its first order clearly directed the learned Magistrate that the application of the present applicant shall be decided on its own merits. I consider present to be a fit case for setting aside the order passed by the Court below. The Magistrate is directed to consider the application of the present applicants afresh on merits of the matter also taking into consideration that the learned public prosecutor has made clear and unequivocal statement in the Court that a challan/supplementary challan shall be filed against the present applicant. The learned Magistrate, while considering the application shall not be swayed away by his impressions nor should be influenced by the fact that two of his orders have been set aside by this Court. He being subordinate to the High Court should not forget that, when the High Court issues a direction then even if such direction is not palatable to the said Judge, is required to be observed by the said Judge.

The order passed by the Court below is set aside. The applicants are given liberty to move an application u/s 439, Criminal Procedure Code before the said Court where the co-accused are facing trial. The learned Judge, after receiving the application, shall decide the same treating that the police has registered a case against the present applicants and either they have filed a challan against the applicants or are likely to file challan against the applicants. The earlier interim orders granted by this Court are extended upto 30-6-1998. The petition is finally disposed of.