
(1992) 04 GUJ CK 0014
In the Gujarat High Court

Makwana Sambhubhai Chethabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-04-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 439(1), 439(1)

Citation : (1992) 2 GLR 1291

Hon'ble Judges : R.K. Abichandani, J

Bench : Single Bench

Judgement

R.K. Abichandani, J.—Rule. Mr. D.N. Patel, Asstt. Public Prosecutor waives service of Rule.

2. This is an application u/s 439(1) of the Criminal Procedure Code by the petitioner who has been accused of the offence of murder. It appears that the applicant had earlier made similar application to the Sessions Court, Bhavnagar, and by a reasoned order dated 10th December, 1991, the learned Additional Sessions Judge, Bhavnagar had rejected the petitioner's application being Miscellaneous Criminal Application No. 819 of 1991. The main accusation levelled against the petitioner is that, on the day of the incident, he had dealt axe blows to Raghav and as a result of the axe blow given to him on his head, Raghav died. According to the version emanating from F.I.R and other police papers, three persons had accosted Raghav who was going on a motor-cycle and way-laid him inflicting injuries with various weapons resulting in his death.

3. It was submitted by the learned Counsel appearing for the applicant that this second application u/s 439(1) of the Criminal Procedure Code would directly lie before the High Court because the High Court also has a special power under that provision to release such person on bail. There can be no dispute about the fact that any person accused of an offence and in custody may be directed to be released on bail by the High Court or a Court of Sessions. Therefore, a person accused of an offence may directly apply to the High Court for bail and the High Court in its discretion can entertain such an application, though, ordinarily, an

application ought to be made first to the Sessions Court which is a Court subordinate to the High Court. Once, however, an application is made to the Sessions Court and is considered on merits culminating in an order made by the Sessions Court, the power, contemplated to be exercised u/s 439(1), is exercised by that Court. When the Sessions Court rejects an application for bail made u/s 439(1) on merits, an order refusing to grant bail would be a judicial order. The Criminal Procedure Code makes elaborate provisions for appeals and revisions for challenging judicial orders. In all the matters where appeals or revisions lie, subject to the conditions prescribed for the exercise of such powers, the High Court can pass appropriate orders exercising powers similar to those of the subordinate Courts while setting aside their orders. Judicial discipline demands that a judicial order made by the subordinate Sessions Court having powers concurrent to those of the High Court should be examined when the concurrent power of the High Court is invoked u/s 439(1) of the Code. The scheme of the Code clearly indicates that the judicial orders made by the subordinate Courts hold the field until they are set aside by the higher judicial forum. The requirement to challenge the order of the subordinate Court in no way detracts from the power conferred on the High Court u/s 439(1) of the Code. Therefore, for effective exercise of the powers of the High Court u/s 439(1), the validity of the order of the Sessions Court rejecting bail has to be examined. That order passed in exercise of the power u/s 439(1) would, as stated above, govern the field until set aside and substituted by an order made by the High Court u/s 439(1) of the Code.

4. When an application is directly made to the High Court u/s 439 and the High Court passes an order refusing the bail, there can be no manner of doubt in holding that no fresh application can be made to the Sessions Court. This would be so despite the fact that there is no such prohibition engrafted in Section 439(1) of the Code, the principle being that so long the order of the High Court governs the field, the Sessions Court, which is the Court subordinate to it, cannot examine the correctness of that order. And for that matter, once the High Court passes an order u/s 439(1), not only the Sessions Court cannot make an order in the same subject-matter of that accused, but even in the changed circumstances, the High Court alone can vary its order. The Sessions Court, obviously, cannot sit in judgment over the order of the High Court u/s 439(1) by entertaining an application under that provision on the ground that it has concurrent powers and that there is nothing expressly indicated in Section 439 preventing that Court from exercising its powers in cases where the High Court has exercised such power. Such a course, if permitted, would lead to judicial chaos. Instances are not wanting where the Sessions Courts have been successfully moved u/s 439(1) in face of the orders of the High Court already made under that provision. To prevent abuse of the process, it is essential to hold that, having regard to the scheme of the Code recognising the hierarchy of Courts and providing for appellate and revisional powers as also investing inherent powers in the High Court, the Sessions Court will have no power to pass

an order u/s 439 in respect of the accused in whose case the High Court has already exercised its power under that provision. The other side of the coin is that, once a judicial order is made by the Sessions Court u/s 439 in respect of the accused refusing bail to him, that order ought to govern the field until it is set aside by the High Court-It may then exercise its powers u/s 439 to enlarge him on bail. The order of the Sessions Court cannot just be ignored, and until it is set aside, there would be no occasion for this Court to exercise powers u/s 439(1) of the Code. It is in this context, that the opening words of Section 439(1) "A High Court or Court of Sessions may direct...should be read. In other words the provision does not contemplate orders by both the forums at the same time. If that be so, it may produce conflicting orders in the same matter. To say that when the High Court exercises powers u/s 439 the order of the Sessions Court will be impliedly superseded, grossly undermines the value of the judicial order passed by a subordinate Court, which ought to be scrutinised for its validity before any contrary order is made by the High Court. The situation which arises after an order is made by the Sessions Court u/s 439 is not the same situation as it prevails when there is no order of that Court Therefore, when an order is already made by the Sessions Court u/s 439, there would be no occasion for the High Court to exercise its powers under the same provision until that order holds good. The accused who has been refused bail by the Sessions Court, cannot, therefore, approach the High Court for bail without challenging that order. The proper course for him would be to challenge that order and simultaneously pray for bail invoking the power of the High Court u/s 439(1) of the Code.

5. It was submitted that, the High Court has no revisional powers against an order made by the Sessions Court regarding bail since it would be an interlocutory order. If the bail application made u/s 439 is to be considered a substantive proceeding which can be finally concluded by an order made in that application, then such an order would not be an interlocutory order. The Supreme Court in *Amar Nath and Others Vs. State of Haryana and Another*, in paragraph 6 of the judgment, while illustrating the orders which may be of an interlocutory nature, has referred to orders for bail. In *Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat*, , the Supreme Court has, in terms, held that it cannot be doubted that grant or refusal of bail application is essentially an interlocutory order and there is no finality to such an order though an application for bail can always be renewed from time to time. The decision of the Supreme Court in *Amar Nath's case (supra)* has been overruled in *Madhu Limaye Vs. The State of Maharashtra*, , in so far as it held that, inherent powers u/s 439 of the Code would not be available to defeat the bar contained in Section 397(2) and the Supreme Court, in terms held that even assuming that the revisional powers of the High Court were impermissible, the inherent powers u/s 482 can be invoked. To this extent, by the later decision of the Supreme Court in *Madhu Limaye's case*, which of a larger Bench the statement of law earlier made was modified. It is, therefore, now well settled that, even if a revision application does not lie u/s 397(2) of the Code, that would not preclude the exercise of the

inherent powers by the High Court u/s 482 of the Code. Therefore, a judicial order, which cannot be amenable to revisional jurisdiction, would still become subject to the scrutiny of the High Court u/s 482 of the Code in exercise of its inherent powers. In this view of the matter, an order made by the Sessions Court u/s 439 can be challenged before the High Court invoking its inherent jurisdiction and if the High Court finds that in exercising its powers u/s 439, the Sessions Court has passed an unjust order, the High Court can set it aside and can grant bail in exercise of its own powers u/s 439(1) of the Code. Therefore, this application can be rejected simply on the ground that, so long as the order of the Sessions Court made u/s 439(1) governs the field, there is no occasion for invoking the power of the High Court under the same provision especially when the order is not even challenged in this application.

6. In *Devi Das Raghu v. State*, the learned single Judge of the Bombay High Court held that the fact that the Sessions Court has refused bail u/s 439 does not operate as a bar for the High Court entertaining a similar application u/s 439 on the same facts and for the same offence. There can be no dispute about the fact that the power given by Section 439 to the High Court or to the Sessions Court is an independent power and when the High Court exercises the power u/s 439, it does not exercise any revisional jurisdiction. However, as held by me above, the occasion to exercise the power u/s 439 by the High Court will not arise until the order of the Sessions Court governs the field and therefore for the purpose of exercising power u/s 439, the High Court has, necessarily, to set aside the judicial order made by the Sessions Court under that provision. Such a course, does not, in any way, circumscribe the powers of the High Court u/s 439(1) of the Code.

7. The Bombay High Court had followed the decision of the Kerala High Court in *Gopi Nath v. State of Kerala*, in which it was held while construing the provisions of Section 439 that, Section 438 was not intended to give a restricted forum in the sense that when one forum is chosen, the jurisdiction of the other is excluded. The learned single Judge dissented from a Division Bench judgment of the Calcutta High Court in *Amiya Kumar Sen v. State of West Bengal*, (reported in 1979 Cri. LJ 288), in which it was held that, Section 438 has given a choice of selecting the forum for filing the petition for anticipatory bail-to choose either the High Court or the Court of Sessions though both the Courts have been made forums for the approach of the applicant. It was held by the Calcutta High Court that, if the petitioner approaches the Court of Sessions for relief u/s 438 and if his prayer is rejected, he cannot again be entitled to approach the High Court for the same relief on the same ground under that section. These decisions are on the provisions of Section 438 of the Criminal Procedure Code and it will be noticed that there is difference of language in the provisions of Sections 438 and 439. It is, therefore, not necessary to express any opinion on the provisions of Section 438 of the Criminal Procedure Code in this matter since there is no question of anticipatory bail involved. As indicated above, this Court can always exercise its powers u/s 439(1) no sooner it is brought to its notice that the order,

which is made under that provision by the Sessions Court, is unjust and the powers can be exercised by this Court effectively by setting aside the order of the Sessions Court and passing an adequate order under this provision.

8. Reliance was sought to be placed on the decision of the Allahabad High Court in Mahmood Muzaffar Vs. State, in which the Allahabad High Court held that the unfettered discretion which was vested in the High Court u/s 498 of the Cr. P. Code of 1898 in the matter of grant of bail was not in any manner as a matter of law affected or narrowed down merely because the Sessions Judge has refused to exercise a discretion in favour of the accused. There can be no dispute about this proposition and the mere fact that Sessions Court is also vested with the power would not, in any way, undermine the powers of the High Court under that provision. In fact the Allahabad High Court as can be seen from paragraph 13 of its judgment had examined the validity of the order of the Sessions Court and came to its own conclusions for exercising its discretion u/s 498 of the Code. The question as to whether a judicial order passed by the Sessions Court u/s 439(1) should be totally ignored and as to the change in situation in view of the fact that an order is made u/s 439(1) by the Sessions Court was neither agitated nor considered by the Allahabad High Court.

9. The learned Counsel for the petitioner, however, submitted that the matter may also be considered in exercise of the inherent powers of this Court and he was permitted to address the Court on merits against the validity of the order of the Sessions Court and on the aspect whether any case is made out for this Court to exercise power u/s 439(1) of granting bail to the accused. The accusation made against the petitioner is that, he was having an axe at the time of the incident; that while Raghav was going on a motor-cycle he had given one axe blow on his hand as a result of which Raghav fell down and thereafter he had given axe blow on the head of Raghav. Other persons who have been accused also gave blows with the weapons which they were having. Two persons claiming to be eye-witnesses, namely, Bhupatbhai and Kiritbhai have referred to the role played by the petitioner. The learned Sessions Judge has considered these relevant aspects and found that there was no reason to disbelieve Bhupatbhai and Kiritbhai at this prima facie stage.

10. Having regard to the part which is said to have been played by the accused the seat of injury, the find of the lethal weapon and the version of the persons claiming to be eye-witnesses, it does appear that this is not a fit case in which this Court should exercise its powers u/s 439(1) of enlarging the accused on bail and it appears that the Sessions Court has validly exercised its powers under that provision in rejecting the bail application of the petitioner. This application is therefore, rejected Rule discharged.