
(1987) 09 GUJ CK 0011
In the Gujarat High Court

Rameshbhai Lallubhai Luni

APPELLANT

Vs

Devraj Bhalabhai and Others

RESPONDENT

Date of Decision : 21-09-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 439(2), 439(2)

Citation : (1988) 1 GLR 109

Hon'ble Judges : N.B. Patel, J;D.C. Gheewala, J

Bench : Division Bench

Judgement

N.B. Patel, J.—This reference arises out of Criminal Revision Application No. 99 of 1987 filed by the petitioner praying that the orders, dated 28-2-1987 and 9-3-1987 passed by the learned Judicial Magistrate, First Class, Mehsana, may be quashed and set aside and the bail granted by the learned Magistrate to the opponents Nos. 1 to 4 may be cancelled and the learned Magistrate may also be directed to grant remand of the opponents Nos. 1 to 4 to police custody. The facts and the circumstances leading to the reference may first be briefly set out. The petitioner is the husband of one Bai Kaliben and is a resident of village Khadalpur in Mehsana taluka of Mehsana district. Bai Kaliben is a relative of the opponent No. 1. It is alleged that, on 18-2-1987 at about 11.30 p.m. the opponents Nos. 1 to 4, accompanied by several other persons, went to village Khadalpur and forcibly abducted the petitioner's wife, Kaliben. Information of this offence was lodged at Laghnej Police Station on or about 18-2-1987 and ultimately the opponent No. 1 was arrested on 20-2-1987 and the other three opponents were also arrested on 8-3-1987. The opponent No. 1 was taken on police remand on 21-2-1987 for two days and was again produced before the learned Magistrate on 23-2-1987 with a request by the P.S.I., Laghnej, to grant further remand of the opponent No. 1 to police custody for two more days. However, the learned Magistrate by his order, dated 23-2-1987, rejected the request of the police for taking the opponent No. 1 on further remand and on the same day passed an order to release the opponent No. 1 on bail. One of the orders which the petitioner wants to be set aside is this order, dated 23-2-1987,

whereby the request of the police to remand the opponent No. 1 to police custody for two more days was rejected and the opponent No. 1 was granted bail. The opponents Nos. 2, 3 and 4, who were subsequently arrested on 8-3-1987, were produced before the learned Magistrate on 9-3-1987 and at that time the police asked for remanding the said opponents also to police custody for a period of seven days. However, by his order, dated 9-3-1987, the learned Magistrate rejected the said request of the police and, in respect of these opponents also, he passed a bail order on that day. It is this order, dated 9-3-1987 which is also challenged by the petitioner. The petitioner has prayed that the orders granting bail to the four opponents be cancelled and he has further prayed that the learned Magistrate may be directed to remand all the four opponents to police custody.

2. So far as the request for cancellation of the bail order is concerned, it is obviously one made u/s 439(2) of the Criminal Procedure Code. It may be noted here that the petitioner did not approach the Sessions Judge, Mehsana, for cancellation of bail before approaching the High Court by the present petition.

3. It appears that when the matter came up for hearing before the learned single Judge of this Court (I C. Bhatt, J.), a question was raised whether the application for cancellation of bail which was made directly to the High Court without first approaching the Sessions Judge, Mehsana, was maintainable or not. Observing that a learned Judge of this Court (R.A. Mehta, J.) has held in the case of *Ramchandra Kashiram Vora v. State of Gujarat* (28 (1) GLR 85) that, normally, "the party should approach the Sessions Court first and then come to the High Court if he is aggrieved by the order of the Sessions Court", the learned Judge (I.C. Bhatt, J.) felt that the question arising required to be preferred to the Division Bench and ordered the matter to be placed before the Honourable the Chief Justice for making suitable orders and, that having been done. Honourable the Chief Justice has referred the aforesaid question to this Division Bench.

4. While making reference to the Division Bench, the learned Judge has stated that the question to be placed for decision by the Division Bench is whether the party should first be "relegated" to the Sessions Court by way of an application u/s 439 of the Criminal Procedure Code or the High Court should directly entertain such an application.

5. In effect, the question which falls for consideration by, and the decision of, the Division Bench is whether a person seeking cancellation of a bail order made by a Judicial Magistrate, can directly approach the High Court u/s 439(2) of the Criminal Procedure Code or he should first approach the concerned Sessions Judge and can approach the High Court only thereafter if he is aggrieved by the order of the Sessions Judge. In other words, the question is, whether, if a person seeking cancellation of a bail order approaches the High Court directly u/s 439(2) of the Criminal Procedure Code, without having recourse to the concerned Sessions Judge for the purpose, his application should be entertained by the High Court or he should be asked first to approach the concerned Sessions Judge.

6. It is obvious that a reference should first be made to Section 439, and especially to Section 439(2), of the Criminal Procedure Code to resolve the aforesaid question.

7. Section 439 of the Criminal Procedure Code provides :

439. (1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

8. It is manifest on a plain reading of Section 439(2) of the Criminal Procedure Code that the jurisdiction to direct that any person, who has been released on bail under Chapter XXXIII of the Code, be arrested and committed to the custody, is vested both in the Court of Session and the High Court, even though the bail order may have been made by a Magistrate. Even a bare reading of the provision leaves no doubt as to the fact that the jurisdiction of the Court of Session and the High Court is a concurrent jurisdiction and there is nothing in the provision itself even remotely suggesting that the High Court cannot entertain an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code directly, that is, without an approach having been first made to the Court of Session in that behalf. It is also not brought to our notice that a practice has grown in our High Court whereby an application for cancellation of bail is not directly entertained by the High Court and if somebody makes such an application directly to the High Court he is asked to approach the Sessions Court first or that such an application directly made to the High Court is transmitted down to the concerned Sessions Judge for hearing and disposal. In fact, we were told at the Bar that all along such applications for cancellation of bail are directly entertained by the High Court even though the bail order might have been made by a Judicial Magistrate.

9. Still, however, the question is whether there is anything in the decision of R.A. Mehta, J. in the case of *Ramchandra Kashiram Vora v. State of Gujarat* (supra) to show that there is any embargo on the power of the High Court in entertaining

such an application directly or there is even a practice that such an application should not be entertained by the High Court directly. We find nothing in the decision of R.A. Mehta, J. to show or to suggest that an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code cannot or should not be entertained directly by the High Court. The case before R.A. Mehta, J. was certainly not a case for cancellation of bail u/s 439(2) of the Criminal Procedure Code, but it was a case where anticipatory bail was sought from the High Court directly u/s 438 of the Criminal Procedure Code without first making an approach to the concerned Sessions Court. It is true that R.A. Mehta, J. has held that it would be sound exercise of Judicial discretion not to entertain each and every application for anticipatory bail directly, bypassing the Court of Session. This view of the learned single Judge is based on the convenience or inconvenience of the parties, and especially of the Public Prosecutor and the investing officer, because the Sessions Court is nearer to the accused persons and is easily accessible and even if an accused-person fails in getting an order for anticipatory bail from the Sessions Court, he has a further remedy to approach the High Court and, therefore, the practice of insisting upon the petitioners for anticipatory bail first approaching the Sessions Court will not prejudice them. It is said that it is only where there are special and exceptional circumstances to approach the High Court directly that High Court should entertain anticipatory bail applications directly without insisting upon the petitioners first approaching the Sessions Court.

10. It is thus clear that the view taken by R.A. Mehta, J. in the aforesaid case which would virtually discourage people from approaching the High Court directly was taken in respect of anticipatory bail applications u/s 438 of the Criminal Procedure Code and not in respect of applications for cancellation of bail u/s 439(2) of the Criminal Procedure Code.

11. It may, however, be said that the jurisdiction to grant anticipatory bail u/s 438 of the Criminal Procedure Code is also a concurrent jurisdiction vested both in the High Court and in the Sessions Court and, therefore, on analogy, the same view should be taken in respect of applications for cancellation of bail as has been taken by R.A. Mehta, J. in respect of anticipatory bail applications in the aforesaid case. Now, so far as Section 438 of the Criminal Procedure Code is concerned, its material part provides that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under that action and that Court may, if it thinks fit, direct that, in the event of such arrest he shall be released on bail. It is thus clear that Section 438 of the Criminal Procedure Code also confers concurrent jurisdiction in the High Court and the Sessions Court to grant anticipatory bail. In fact it can be argued with some force that Section 438 of the Criminal Procedure Code confers on the applicant a right of choice of forum between the High Court and the Sessions Court inasmuch as it provides that the concerned person may apply to the High Court or the Court of Sessions. It may be said that despite this petition. R.A.

Mehta, J. has taken the view that a person seeking anticipatory bail should ordinarily be made first to approach the Sessions Court. The view of R.A. Mehta, J. in the aforesaid case was challenged before us but we do not consider it necessary, for the purposes of deciding the question before us, to go into the correctness or otherwise of the said view. This is so, because, even assuming that the view of R.A. Mehta, J. in respect of anticipatory bail applications u/s 438 of the Criminal Procedure Code is correct, the analogy of that view cannot be applied to an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code. The main factor which influenced R.A. Mehta, J. in taking the above view was that if the applications for anticipatory bail were directly entertained by the High Court, it would cause hardship and inconvenience to the Public Prosecutor and the investigating officer and no prejudice would occur to the persons seeking anticipatory bail even if they were directed first to approach the Sessions Court. Even assuming that this was a valid consideration justifying restriction of choice (regarding the forum to be approached) which is granted by the Parliament to the petitioners, we are of the opinion that similar considerations of hardship or inconvenience would not arise in the case of applications for cancellation of bail u/s 439(2) of the Criminal Procedure Code. When a person moves for anticipatory bail for the first time, there is no earlier judicial order containing a discussion about the nature of the offence, the nature of the evidence, the antecedents of the applicant etc. in the circumstances, it may be necessary for the Public Prosecutor sometimes to seek instructions from the investigating officer. However, when the question is of cancellation of bail already granted to an individual there is in existence a judicial order by which he was granted bail which order would contain the necessary facts as to the nature of the offences, the nature of the evidence, the antecedents of the accused person and the suitability or otherwise of the accused-person in other respects for being admitted to bail or for being denied bail. In such a case, it may hardly ever be necessary for the State Public Prosecutor appearing before the High Court to seek other instructions from the investigating officer. It must be assumed that the investigating officer would place all such material before the Magistrate which would, in his opinion, require refusal of bail to the accused. The State Public Prosecutor can make use of such material when the matter comes up before the High Court for cancellation of bail.

12. Further more, the incidence of bail cancellation applications may not be as high as that of anticipatory bail applications. In view of that fact also it may not be proper to whittle down the clear effect of the language of Section 439(2) of the Criminal Procedure Code which confers concurrent jurisdiction on the High Court and the Court of Session to cancel bail without any words of limitation such as that the petitioner must first move the Sessions Court and can approach the High Court only if he is aggrieved by the order of the Sessions Court.

13. It is true that Section 439(2) of the Criminal Procedure Code invests the High Court and the Court of Session with judicial discretion to cancel bail. The question is whether exercise of this discretion embraces or implies any power to

restrict the petitioner's choice of forum where the legislature has in clear and unequivocal terms given him such choice by conferring concurrent jurisdiction on two Courts. We are clearly of the opinion that the discretion to be exercised is only with respect to the question whether the facts and circumstances of the case would justify cancellation of bail which is already granted. The exercise of discretion cannot be extended to the question whether the petitioner should have approached the Sessions Court first or should be allowed to approach High Court first. In fact we have also some doubts about High Courts power to evolve any practice which would fly in the face of the clear and unequivocal language of the enactment. The assumption, in our opinion, should be that the Parliament has, advisedly and in all its wisdom, conferred concurrent jurisdiction after considering all pros and cons and all the implications of what it was doing. We may, however, hasten to add that we are deliberately refraining from entering into the question of correctness or otherwise of the view taken by R.A. Mehta, J. in the case of *Ramchandra Kashiram Vora v. State of Gujarat* (supra) in respect of anticipatory bail applications u/s 438 of the Criminal Procedure Code because we feel that we are not called upon to enter into that question for the purpose of deciding the present reference. We may only note that a view similar to one taken by R.A. Mehta, J. in respect of anticipatory bail applications is taken by certain other High Courts also, to wit, by the Rajasthan High Court in *Hajialisher Vs. The State of Rajasthan*, by the Karnataka High Court in *K.C. Iyyar and etc. v. State of Karnataka* 1985 Cri. LJ 214 and by the Punjab and Haryana High Court in *Chhajju Ram Godara and Others Vs. State of Haryana and Another*, . A contrary view has also been taken in *Mohan Lal and Others etc. Vs. Prem Chand and Others etc.*, which is a Full Bench decision. There is also the case of *Amiya kumar Sen Vs. State of West Bengal*, wherein the propositions laid down are (i) choice is given to the petitioner for anticipatory bail to choose either of the forums that is either the High Court or the Sessions Court and (ii) this choice is, however, restricted, in the sense that he cannot approach both the forums one after the other. In that case, an application for anticipatory bail was first made to the Sessions Court and it was rejected by the Sessions Court and then a fresh application for anticipatory bail was made to the High Court but it was held that it cannot be made because the party can approach either the Sessions Court or the High Court and not both the courts even though it may be one after the other. One may or may not agree with this view but the necessary corollary which flows from the view taken by the Calcutta High Court in this decision is that one can apply directly to the High Court for anticipatory bail u/s 438 of the Criminal Procedure Code without first approaching the Sessions Court. But this conflicting view are all in respect of anticipatory bail applications u/s 438 of Criminal Procedure Code,

14. Whatever may be the view one may take regarding applications for anticipatory bail, we find that so far as an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code is concerned, it is open to the person seeking cancellation of bail to approach the High Court directly without first

approaching the Sessions Court.

15. There is, of course, one decision of Himachal Pradesh High Court in *Sher Singh v. Singha Singh* 1972 Cri. LJ 1607 which is directly to the point and is in favour of the view that in the case of an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code, it is "desirable" that the parties should first approach the Sessions Judge. The decision was rendered by R.S. Pathak, C.J. (as he then was) of the Himachal Pradesh High Court and his observations are as under:

It seems to me that in the circumstances, the petitioner should apply to the learned Sessions Judge in the first instance. That course will be in accordance with the law laid down by this Court in *Gulam Ali Vs. State*, . Learned Counsel for the petitioner has drawn my attention to *S. Narayanan Vs. Kannamma Bhargavi and Others*, where a Full Bench of the Kerala High Court has observed that there is no legal bar to a party approaching the High Court without first moving the Sessions Judge or the District Magistrate. Reference was made to the practice prevailing in that High Court. There is no doubt that a party is entitled to apply to the High Court even as he is entitled to do so before the learned Sessions Judge. But whenever concurrent jurisdiction is vested by the statute simultaneously in two Courts, one superior to the other, I consider it appropriate that the party should apply to the inferior Court first. There are a number of reasons persuading me to that conclusion. Firstly, if a party is required to go to the inferior Court in the first instance the superior Court has the advantage of the opinion of the inferior Court when the occasion arises for the exercise by it of its jurisdiction in the matter. Secondly, the inferior Court is generally situated in the same or very near the place where the authority is situate from whose order the revision application is made, and it is more convenient and saves time for the record to be sent from that authority to the inferior Court when the revisional application is filed and upon disposal of the revision application for the record to be returned to the authority for disposal of the case, Thirdly, it provides against the superior Court being flooded with cases which can be more appropriately disposed of by the inferior Court. These are reasons which have generally prevailed with the High Courts in holding that where it is a case of concurrent jurisdiction a party should ordinarily apply to the inferior Court in the first instance. The rule is not an absolute rule. It is to be applied *ex debito justitiae*. There may be a case where the interests of justice may be defeated if a party is required to apply to the inferior Court first before approaching the High Court. The rule must then give way to the interest of justice.

16. We are in respectful disagreement with the aforesaid view, because we find that the Parliament must be assumed to have considered all the implications of conferring concurrent jurisdiction on two Courts, one superior and the other inferior, and must then have deliberately and advisedly conferred concurrent jurisdiction. Once concurrent jurisdiction is conferred without limiting the choice of forum to which a party may take recourse, no practice which runs counter to

such a provision can be countenanced. In our view, considerations of appropriateness cannot be allowed to arise in such a case. When a right is given to a party to choose one or the other forum, he must be taken to be the best Judge as to the forum which would be more convenient to him. We feel, with due respect, that the choice which the legislature has given to a party in respect of the forum to be taken recourse to by him, cannot be taken away by the High Court even for the reasons mentioned in the aforesaid decision in 1972 Cri. LJ 1607.

17. In the result of the above discussion, our answer to the question referred to us, is that the High Court can and should entertain an application for cancellation of bail u/s 439(2) of the Criminal Procedure Code directly, that is, even if the applicant has not approached the Sessions Court first.

The matter will now go back for disposal on merits.