

A.F.R.

Court No. - 79

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 37894 of 2021

Applicant :- Jitendra @ Jitendra Kumar Singh

Opposite Party :- State of U.P.

Counsel for Applicant :- Abhijeet Singh, Anupam Dubey

Counsel for Opposite Party :- G.A., Vikrant Rana

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Anoop Trivedi, Senior Advocate assisted by Sri Abhijeet Singh and Sri Anupam Dubey Advocates, the learned counsel for the applicant, Sri Dinesh Kumar Srivastava Advocate, the learned Additional Government Advocate, Sri Vikrant Rana Advocate, the learned counsel for the informant and perused the record.

2. The instant application has been filed seeking release of the applicant on bail in Case Crime No. 0222 of 2021, under Sections 420 and 120-B IPC, Police Station Noida Sector-39, District Commissionerate Gautam Budh Nagar during pendency of the trial in the Court below.

3. The aforesaid case has been registered on the basis of an F.I.R. dated 02-05-2021 lodged by an official of M/s CMS Infosystems Pvt. Ltd. against three named accused persons – (i) Vipendra Kumar, Custodian Employee, (ii) Suraj Singh, Custodian employee and (iii) Aayush, alleging that the company CMS Infosystems Pvt. Ltd. provides services of loading and unloading of cash in ATMs and withdrawal and deposit of cash, to Bank of Baroda. Between 18:30 and 20:15 on 22-03-2021, the accused persons took out Rs.2,95,000/- that had been deposited by the Bank's customers in a BNA Machine and they repeatedly deposited the same amount in several bank accounts and thus they embezzled a total amount of Rs.26,63,500/-. The incident was recorded in the close circuit camera and the

company came to know about it through the Bank's email dated 27-04-2021.

4. At the very outset, Sri Vikrant Rana Advocate, the learned counsel for the informant has raised a preliminary objection that the applicant had been arrested on 21-06-2021 and he was released on short term bail on 25-06-2021 and presently the applicant is not in custody and a person's bail application can only be considered when he is in custody. His submission is that for the aforesaid reason, the instant application seeking release of the applicant on bail is not maintainable.

5. Section 439 of the Criminal Procedure Code provides as follows: -

*“439. (1) A High Court or Court of Session may direct—
that any person accused of an offence and **in custody** be released on bail, and if the offence is of the nature specified in subsection (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;
that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.”*

6. Sri Vikrant Rana has placed reliance upon the judgment in the case of **Niranjan Singh v. Prabhakar Rajaram Kharote**, (1980) 2 SCC 559, in which the Hon'ble Supreme Court explained the phrase “in custody” in the following words: -

“6. Here the respondents were accused of offences but were not in custody, argues the petitioner so no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in one view, an outlaw cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can move the court for bail under Section 439 CrPC unless he is in custody.

7. *When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.*

8. *Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.*

9. *He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. **He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.***

(Emphasis supplied)

7. In **Sundeeep Kumar Bafna v. State of Maharashtra**, (2014) 16 SCC 623, the Hon'ble Supreme Court discussed the meaning of the word 'custody' in the following words: -

"8. ...CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that CrPC has placed an embargo against granting relief to an accused, (couched by us in

the negative), if he is not in custody. ... We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well-established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Sessions Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word "custody" the same or closely similar meaning and content as arrest or detention....

Meaning of custody

9. Unfortunately, the terms "custody", "detention" or "arrest" have not been defined in CrPC, and we must resort to few dictionaries to appreciate their contours in ordinary and legal parlance:

9.1. Oxford Dictionary (online) defines "custody" as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress, and durance.

9.2. Cambridge Dictionary (online) explains "custody" as the state of being kept in prison, especially while waiting to go to court for trial.

(emphasis supplied)

9.3. Longman Dictionary (online) defines "custody" as "when someone is kept in prison until they go to court, because the police think they have committed a crime".

9.4. Chambers Dictionary (online) clarifies that custody is "the condition of being held by the police; arrest or imprisonment; to take someone into custody to arrest them".

9.5. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration.

9.6. Collins Cobuild English Dictionary for Advance Learners states in terms that someone who is in custody or has been taken into custody or has been arrested and is being kept in prison until they get tried in a court or if someone is being held in a particular type of custody, they are being kept in a place that is similar to a prison.

9.7. *Shorter Oxford English Dictionary* postulates the presence of confinement, imprisonment, duration and this feature is totally absent in the factual matrix before us.

9.8. *Corpus Juris Secundum* under the topic of “Escape & Related Offenses; Rescue” adumbrates that

“custody, within the meaning of statutes defining the crime, consists of the detention or restraint of a person against his or her will, or of the exercise of control over another to confine the other person within certain physical limits or a restriction of ability or freedom of movement.”

9.9. This is how “custody” is dealt with in *Black’s Law Dictionary*, (5th Edn. 2009):

“**Custody.**—The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man’s person by virtue of lawful process or authority.

The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term ‘custody’ within statute requiring that petitioner be ‘in custody’ to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. *US ex rel Wirtz v. Sheehan* 319 F Sup 146. Accordingly, persons on probation or released on own recognizance have been held to be ‘in custody’ for purposes of habeas corpus proceedings.”

10. A perusal of the dictionaries thus discloses that **the concept that is created is the controlling of a person’s liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person’s freedom of action.** Our attention has been drawn, in the course of rejoinder arguments to the judgment of the Full Bench of the High Court of Madras in *Roshan Bevi v. State of T.N.* 1984 CriLJ 134, as also to the decision of the Court in *Directorate of Enforcement v. Deepak Mahajan* (1994) 3 SCC 440 ; in view of the composition of both the Benches, reference to the former is otiose. Had we been called upon to peruse *Deepak Mahajan* earlier, we may not have considered it necessary to undertake a study of several dictionaries, since it is a convenient and comprehensive compendium on the meaning of arrest, detention and custody.

(Emphasis supplied)

8. In this case, the Hon'ble Supreme Court relied upon the law laid down in **Niranjan Singh (Supra)** quoted above.

9. Sri Rana has also placed reliance upon the judgment of Hon'ble Supreme Court in the case of **Sunita Devi Vs. State of Bihar and another, (2005) 1 SCC 608**, in which the Hon'ble Supreme Court held as follows: -

“11. The grey area according to us is the following part of the judgment in K.L. Verma case, (1998) 9 SCC 348 “or even a few days thereafter to enable the accused persons to move the higher court, if they so desire” (SCC p. 351, para 3).

12. Obviously, the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is “in custody”. In K.L. Verma case (1998) 9 SCC 348 reference was made to Salauddin case (1996) 1 SCC 667. In the said case there was no such indication as given in K.L. Verma case that a few days can be granted to the accused to move the higher court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

13. In view of the clear language of Section 439 and in view of the decision of this Court in Niranjan Singh v. Prabhakar Rajaram Kharote (1980) 2 SCC 559 there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

*14. The crucial question is when is a person in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. **The word is of elastic semantics but its core meaning is that the law has taken control of the person.** The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the po-*

lice have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.”

10. In reply, Sri Anoop Trivedi, learned Senior Counsel appearing for the applicant has submitted that the applicant was taken into custody 21.06.2021 and he had been released on interim bail by means of an order dated 25.06.2021 passed by the learned Civil Judge (Senior Division), F.T.C., Gautam Budh Nagar in view of the order passed by the Hon’ble Supreme Court in Writ Petition No. 01 of 2020 – In re: Contagion of Covid – 19 in Prisons, subject to certain restraints like the applicant accused will not indulge in any criminal activity, that he will not go outside the district without permission of the Court and he will surrender before the Court upon completion of the period of bail. His submission is that the aforesaid order passed by the Hon’ble Supreme Court is still in operation and till date, the Hon’ble Supreme Court has not issued any order vacating the order and, therefore, the applicant has not surrendered till date. He has submitted that the applicant was in physical custody and although he has been released on interim bail, he is subject to the direction issued by the Court and, therefore he is in constructive custody of the Court.

11. Sri Anoop Trivedi has relied upon the judgment of a Co-ordinate Bench of this Court in **Criminal Misc. Bail Application No. 29639 of 2018 (Dhirendra @ Dheeraj Tyagi Vs. State of U.P.)**, wherein this Court held that: -

“25. In such facts and in view of position of law as it stands, I find that notwithstanding the lapse of 45 days time period, the applicant is continuing in constructive custody and control of this Court and it would be wholly proper to condone the lapse, if any, on part of the applicant and to allow the applicant's conditional liberty to be maintained in terms of the order dated 24.09.2019 for the period 04.11.2019 till date. Also, otherwise it would lead to an absurd situation where the applicant who has been enlarged on interim-bail would have to again surrender and apply for bail afresh as this application would have been rendered infructuous upon his again being restrained upon

second surrender, forced on him for no fault. "

(Emphasis supplied)

12. In **Criminal Misc. Bail Application No. 12715 of 2020 (Ranveer Singh @ Ranbir Singh Vs. State of U.P.)**, the applicant was enlarged on interim bail by the Jailer of District Jail, Ghaziabad by means of an order on 28 April 2020 passed pursuant to orders passed by the Bench of Hon'ble the Chief Justice in Public Interest Litigation No. 564 of 2020. The interim bail granted pursuant thereof was extended from time to time. On being enlarged on interim bail, the applicant filed regular bail application under Section 439 Cr.P.C. While the applicant was on interim bail, this Court considered his application for grant of regular bail and the same was allowed.

13. In **Satendra Kumar Antil Vs. Central Bureau of Investigation and another**, the Hon'ble Supreme Court had passed an order dated 07.10.2021 which has been reproduced in the final judgment dated 11.07.2022 passed in the aforesaid case reported in **2022 SCC OnLine SC 825** whereby the Hon'ble Supreme Court has directed that regarding category of offences falling in Category A, which are punishable with imprisonment of seven years or less, and which are not falling in category B and C mentioned in the said order, the bail application of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided. Therefore, as per the directions issued by the Hon'ble Supreme Court in the case of **Satendra Kumar Antil (supra)** also, bail application in a case under Section 420 IPC can be decided without the accused being taken into physical custody.

14. In view of the law laid down in the aforesaid judgments, it is clear that for claiming release on bail, a person has to be in custody of the Court which is not necessarily required to be physical custody. As the applicant had been arrested on 21.06.2021 and he has been released on interim bail on 25.06.2021 subject to the condition

imposed by the Court, he remains subject to the directions issued by the Court and he shall be deemed to be in constructive custody of the Court. Therefore, I do not find force in the preliminary objection raised by the learned counsel for the informant and the same is hereby rejected.

15. In the affidavit filed in support of the bail application, it has been stated that the applicant is innocent and he has been falsely implicated in the present case and that he has no criminal history.

16. The informant has filed a counter affidavit opposing the prayer for grant of bail to the applicant and the following pleas of the informant are relevant for deciding the application: -

“10. That it is stated here that there are three kinds of machines which are being used to provide services to the bank customer for deposit and withdrawal of money and the types of the machine are as follows: -

(I) **ATM** – The ATM is a machine in which the cash replenishment is being done by the custodian and the customer can withdraw the money from ATM.

(II) **BNA** - BNA in general terms called as Money Deposit Machine in which the customer can deposit the money or withdraw the money using his or her debit card or without debit card i.e. card less transaction. In BNA Machine the cash cannot be loaded by the custodian and the money which is being deposited by the customers in their respective account can only be withdraw by any of the customer, and in case the cash run in shortage or the machine became empty, an error has been shown by the machine itself and the message of said error is being communicated to MSPs, CMS Company as well as to the bank and only after deposition of money by the customer, the machine starts operating to withdraw the money.

* * *

13. That the modus operandi of the accused persons being custodian

were having access in the ATMs where BNA Machine are being installed to provide the services of deposit and withdrawal of the money to the Bank customers.

14. That it is stated here that at the time of EOD (End of the day) or Cash Evacuation, the custodians get the password to open the vault and after taking the cash available in the machine, they deposited the same amount of money multiple times by using the different number of debit cards of the same bank i.e. Bank of Baroda and during the said entire process vault was remain kept open and the accused person repeatedly took the money from the vault to deposit the same number of times in different accounts and continued the said process for multiple transactions.

* * *

18 That it is also stated here that CMS Company Officials also inspected the CCTV footages of the concerned ATM i.e. the Bank of Baroda having Id. No. ICRUPGB05 and after going through the CCTV footage, the officials found that the two custodians namely Suraj and Vipendra Singh alongwith the ex-employee Aayush @ Vishwajeet found doing foul play with the machine and after full verification of the Criminal act committed by those three persons, an FIR was immediately lodged by the informant against those persons in support of the amount which was found shortage on 22.03.2021.”

17. Thus the informant’s case is that the in BNA Machine the cash cannot be loaded by the custodian and the money which is being deposited by the customers in their respective account can only be withdrawn by any of the customers, and in case the cash runs in shortage or the machine becomes empty, an error is shown by the machine and the message of said error is communicated to MSPs, CMS Company as well as to the bank and only after deposition of money by a customer, the machine starts operating to withdraw the money. The co-accused persons being the custodians, were having access to the BNA machine but the applicant is neither an employee of the Bank nor of the informant and he had no access to the machine.

18. As per the averment made in Paragraph No. 14 of the counter affidavit, the alleged wrong was committed by the co-accused – custodians on 22-03-2021 and an information of the same was sent by the Bank to the informant on 27-04-2021 and the FIR was lodged on 02-05-2021 and yet, the applicant has not been made an accused in the FIR.

19. The sole allegation against the applicant is that a certain amount has been deposited in his bank account and to support that allegation, merely a chart has been annexed with the counter affidavit and not even a statement of his account issued by the Bank has been filed.

20. A mere deposit of an amount in the applicant's account, without any act of commission having been alleged to have been committed by him, does not prima facie make out the commission of the offence alleged by the applicant.

21. Having regard to the aforesaid facts and submissions and keeping in view the fact that FIR of the incident has been lodged after about 1 ½ months since the incident and yet the applicant is not named in the F.I.R.; that the applicant is not an employee of the bank or the cash handling service provider company and he has no access to the BNA machine; that the name of the applicant surfaced during the course of investigation when the informant alleged that certain money has been deposited in his bank account; that there is absolutely no allegation of any act committed by the applicant which may amount to an offence; that the offences are triable by a Magistrate and the applicant has no criminal history, I am of the view that the applicant is entitled to be released on bail.

22. In light of the preceding discussion and without making any observation on the merits of the case, the instant bail application is allowed.

23. Let the applicant **Jitendra @ Jitendra Kumar Singh** be released on bail in Case Crime No. 0222 of 2021, under Sections 420

and 120-B IPC, Police Station Noida Sector-39, District Commissionerate (Gautambudhnagar) on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below, subject to the following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

24. In case of breach of any of the above condition, the prosecution shall be at liberty to move an application before this Court seeking cancellation of the bail.

Order Date :- 30.9.2022

Jaswant