

**B. Narayanappa and ors. Vs. State of Karnataka**

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**Court :** Karnataka

**Decided On :** Feb-05-1982

**Reported in :** 1982CriLJ1334; ILR1982KAR474; 1982(1)KarLJ369

**Judge :** M.S. Patil, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 436 and 496; [Indian Penal Code \(IPC\), 1860](#) - Sections 142, 152, 324 and 353

**Appeal No. :** Criminal Revn. Petn. No. 41 of 1982

**Appellant :** B. Narayanappa and ors.

**Respondent :** State of Karnataka

**Advocate for Def. :** K.H.N. Kuranga, Govt. Pleader

**Advocate for Pet/Ap. :** W.K. Joshi, Adv.

**Judgement :**

ORDER

1. This revision is directed against the order dated 13th January, 1982, passed by the Judicial Magistrate First Class, Chintamani, whereby he has rejected the application of bail made by the petitioners.

2. Sidlaghatta Police having registered a case in Crime No. 195/81 against the petitioners for the offence under Sections 353, 142, 153 and 324 IPC sent F.I.R. to

the Court. The petitioners appeared before the Magistrate and made the application for bail as provided under Section 436 Cr.P.C. All the offences were bailable. But the Magistrate refused to entertain the application of bail and rejected it on the ground that the applicants were neither arrested by the police nor they had been summoned by the Court nor they appeared in response to any process of the Court and as such they could as well be released on bail in the police station and any grant of bail would amount to exercising power not vested in the Court. The petitioners have therefore approached this Court questioning the correctness of the order passed by the Magistrate.

3. The contention of Mr. W. K. Joshi, learned counsel appearing for the petitioner, is that when the accused appeared and surrendered before the Court they placed themselves in the custody of the Court and the word 'appears' used in Section 436, Cr.P.C. is wide enough to include voluntary appearance and therefore the learned Magistrate was in error in rejecting the application made by the petitioner.

4. Mr. K. H. N. Kuranga, learned High Court Government Pleader, appearing for the State, on the other hand submitted that the accused-petitioners had merely appeared before the Court but they had not surrendered and, therefore, mere physical presence of the accused in the Court was not sufficient to grant bail unless they had surrendered themselves, and the Magistrate was right in rejecting the application.

5. The learned Magistrate has referred to certain decisions in reaching the particular conclusion and observed :

'In my opinion, on the basis of the above decisions the word 'appears' appearing in Section 436 Cr.P.C. will not mean the voluntary appearance of the accused at his instance. When he appears through some process of law like summons or otherwise, his application for bail can be considered. If the present application is entertained under Section 436 Cr.P.C. it amounts to granting of anticipatory bail which this Court has no powers.'

6. There is no doubt, that there has been divergent opinion regarding the expression 'appears' as used in Section 436 Cr.P.C. (Section 496 of Cr.P.C.

1898). One view is that the word 'appears' in the context of this section, means appearance in obedience to summons or bailable warrant or in pursuance of an undertaking to appear contained in a bond executed by a person when he is arrested and released by the police; the word does not refer to voluntary appearance of the accused to whom no summons or warrant has been issued or who has not undertaken so to appear. The other view is that the word 'appears' is wide enough to include voluntary appearance of the person accused of an offence even where no summons or warrant has been issued against him.

7. Sub-section (1) of Section 436 Cr.P.C. 1973, which is relevant for our purpose reads as follows :

'Where any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail.'

If it is properly split up and analysed, what emerges out is :

(1) When any person other than a person accused of non-bailable offence -

(i) is arrested or detained without warrant by an officer in charge of a police station, or

(ii)(a) appears, or

(b) is brought before the Court; and

(2) Is prepared :-

(a) at any time while in custody of such Officer, or

(b) at any stage of the proceeding before such Court,

to give bail such person shall be released on bail.

8. In other words, in case of a bailable offence, a police officer, at the time, of arrest or while in his custody, shall release such person accused of bailable offence on bail, if such person is prepared to give bail; or when such person appears or is brought before the Court and he is prepared to give bail, the Court shall release him on bail.

9. There is nothing in the Section either to exclude voluntary appearance or to suggest that the appearance of the accused must be in obedience to a process issued by the Court. No doubt the other expressions used in the section as 'is brought before Court' have reference to prior arrest and bringing of such person before Court by the police either in pursuance of a process issued by the Court otherwise on account of the inability of such person arrested to give bail immediately on being arrested and detained by an officer in charge of the police station. The word 'appears' as used in the section to me, it appears, is wide enough to include the voluntary appearance. Such a question did arise for consideration before this Court in the case of *State of Mysore v. Baswarnath Rao*, (1965 (1) Mys LJ 365 : (1966 Cri LJ 267)) and this Court did not consider it necessary to resolve that question, but proceeded on the basis that the word 'appear' includes voluntary appearance of the accused and dealing with the expression used in the section 'released on bail', concluded that the words 'bail' and 'released on bail' imply the accused already being in restraint and his being set at liberty from such restraint. The concept of bail implies a form of previous restraint and the power to grant bail does not envisage the grant of bail to a person who is under no restraint. Hence, bail cannot be granted to a person who has not been arrested or for whose arrest no warrant had been issued. But, it appears, that is no longer good law in view of recent decision of the Supreme Court in *Niranjan Singh v. Prabhakar Rajaram Kharote* : 1980 CriLJ426 . That was the case where the accused having surrendered before the Court asked for bail, for non-bailable offence. Dealing with the expression 'custody' used in Section 439 Cr.P.C. his Lordship Krishna Iyer, J., observed thus (Paras 8 and 9) :-

'Custody, in the context of Section 439, is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the Court.

He can be in custody not merely when the police arrests him, produces him before the Magistrate, and gets ar remand to judicial or other custody. He can be stated to be in judicial custody when be surrenders before the Court and submits to its directions.'

10. In the present case also the accused having appeared before the Court had submitted to the jurisdiction of the Court and asked for bail. As enunciated in the above decision, if the surrender and the physical presence of the accused with submission to the jurisdiction and orders of the Court is judicial custody then the accused-petitioner herein having appeared before the Court and asked for bail, they were under restraint and they had submitted to the jurisdiction of the Court. The Magistrate was not right in saying that he is not in a position to understand the meaning of the word 'appears' within the meaning of the expression 'custody' as used in Section 439 as discussed in the said decision with the meaning of Section 436 Cr.P.C. When the mere physical presence before the Court with a request to grant bail amounts to custody it is more than appearance. The order passed by the Magistrate rejecting the application, therefore, cannot be sustained and it is set aside and the Magistrate is directed to reconsider the application of the accused on their appearing before him.

11. Petition allowed.