

In Re: Joydeb Pradhan and ors.

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Court : Kolkata

Decided On : Jul-28-2005

Reported in : 2005(3)CHN629

Judge : Amit Talukdar and ;Sankar Prasad Mitra, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 34, 308, 323, 325, 341, 354, 437(3), 438, 439, 448 and 506

Appeal No. : C.R.M. No. 3503 of 2005

Appellant : In Re: Joydeb Pradhan and ors.

Advocate for Pet/Ap. : Gouranga Das, Adv.

Judgement :

Alpha:

1. An otherwise innocuous application under Section 439 of the Code of Criminal Procedure (for short 'the said Code') which under ordinary circumstances could have been disposed of in the usual fashion, however, has hit the Hornet's nest and a situation has so bubbled up that not only the management of G. R. Case No. 159 of 2005 before the Court of the learned Sub-Divisional Judicial Magistrate, Haldia suffers a jinxed deliberation but the same has a wider ramification which has to be addressed by the Court, keeping in mind the issue which has cropped up and covers several such situations that take place daily in the various

Magistracies.

Background:

2. A Division Bench of this Court in C. R. M. No. 3000 of 2005 on April 13, 2005 allowed the prayer of the petitioners in terms of Section 438 of the said Code who apprehended arrest in connection with Nandigram Police Station Case No. 33/05 under Sections 341, 448, 323, 325, 354, 308, 506 and 34. It was directed that the said order under Section 438 of the said Code would remain operative for a period of two (2) weeks.

Cause of Action:

3. Emboldened with the said order in connection with C. R. M. No. 3000 of 2005 the petitioners surrendered before the learned Sub-Divisional Judicial Magistrate, Haldia on 19.4.05 and the learned Magistrate fixed 21.4.05 for looking into the case diary.

Impugned Order:

4. On 21.4.05 upon considering the materials in the case diary the learned Magistrate was of the view that there are 'sufficient materials' against the accused persons and accordingly, he directed:

'So the accused persons are directed to bring the confirm bail order from appropriate authority instead of taken into custody as per decision of K. L. Verma's case....'

and fixed 30.4.05 for further order and appearance of the accused.

Prelude:

5. Failing to reconcile themselves with the said order impugned of the learned Magistrate, Haldia, the petitioners preferred an application under Section 439 of the said Code being C. R. M. No. 3503 of 2005 before this Court.

Preference:

6. A learned Single Judge by his Lordship's order dated 02.5.05 upon hearing the learned Counsels for the petitioners and the State was of the opinion: 'unless and until the accused persons are taken into custody the prayer for bail before this Court does not arise at all.' Accordingly, His Lordship directed the matter to be placed before the Division Bench for passing appropriate orders.

At the Bar:

7. Submissions were made on merit with regard to the non-involvement of the petitioners in the present case and the fact that since they were already protected with an order in terms of Section 438 of the said Code by a Division Bench of this Court the impugned order cannot be sustained.

Per Contra:

8. Learned Senior Government Advocate submits that the order impugned cannot be sustained and has to be set aside in view of the settled position of law.

Relevant Statute:

9. Sections 439 and 438 of the said Code.

'439. Special powers of High Court or Court of Session regarding bail. --(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 so 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.

438. Direction for grant of bail to person apprehending arrest.--

(1) 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 this Section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including--

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub-section (3) of Section 437, as if the bail were granted under that Section :

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.(3) If such person is thereafter arrested without warrant by an Officer-in-Charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such

officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section(1)'.

Case Laws:

Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors., : 1980 CriLJ426 ;

Directorate of Enforcement v. Deepak Mahajan and Anr., : 1994 CriLJ2269 ;

Nirmal Jeet Kaur v. State of M.P. and Anr., : (2004)7SCC558 ;

Sunita Devi v. State of Bihar, : AIR 2005 SC498 ;

Adri Dharan Das v. State of W.B., 2005 SCC (Cri) 933;

Monoranjan Jana v. State of West Bengal, 2005 (3) CHN 93.

Discussion:

10. In view of the decisions of Nirmal Jeet Kaur v. State of M.P. and Anr., (supra), Sunita Devi v. State of Bihar,(supra), and Adri Dharan Das v. State of W.B. (supra) the position is quite well-settled that an order under Section 438 of the said Code remains operative for a limited duration during which the regular Court has to be moved for bail. Such prayer for bail is obviously in terms of Section 439 of the said Code mandating the applicant to be in custody. In the said line of decisions of the Supreme Court it has clearly laid down that firstly an order under Section 438 of the said Code is for a particular tenure; within the said period the petitioner must move the regular Court for bail; such bail could be in terms of Section 439 of the said Code; mandating the applicant to be in custody.

11. Otherwise the distinction between the provisions of Sections 438 and 439 of the said Code would be rendered meaningless.

12. Their Lordships further clarified the distinction between the two provisions-- while in Section 439 of the said Code an order is passed after the arrest; whereas in Section 438 of the said Code it is passed in anticipation of arrest and becomes effective at the very moment of arrest.

13. There cannot be any qualms with the said position in view of the decision of the Supreme Court.

Logistic:

14. In view of the law laid down by the Supreme Court in *Nirmal Jeet Kaur v. State of M.P. Anr.* (supra), *Sunita Devi v. State of Bihar* (supra) and *Adri Dharan Das v. State of W.B.* (supra) the earlier position which has been taken resort to by the learned Magistrate, Haldia by affording the petitioners to move the Higher Court for obtaining an order of bail without taking them into custody, is absolutely militating against the ratio of the decisions of the Supreme Court in the decisions of *Nirmal Jeet Kaur v. State. of M.P. and Anr.* (supra), *Sunita Devi v. State of Bihar* (supra) and *Adri Dkaran Das v. State of W.B.* (supra).

15. Without a whimper the said order has to be set aside. There cannot be a second thought on the said issue.

Logomachy:

16. Once it is understood that the life of an order under Section 438 of the said Code is for a limited duration the next question arises what is the course of action to be adopted by the learned Magistrate upon appearance of the accused during the life of the order under Section 438 of the said Code?

Q. E. D. (Quod Erat Demonstrandum):

17. Neither there is any option nor there is any choice cast upon it while entertaining the prayer of the accused under Section 439 of the said Code but to ensure the fundamental requirement that the accused is in custody in terms of the ratio of the decisions noted in *Nirmal Jeet Kaur v. State of M.P. and Anr.* (supra), *Sunita Devi v. State of Bihar* (supra) and *Adri Dharan Das v. State of W.B.* (supra).

Logjam:

18. Custody. What is the connotation of custody in the context of a post 438 order is no longer res integra in view of the Supreme Court decisions in Nirmal Jeet Kaur v. State of M.P. and Anr. (supra), Sunita Devi v. State of Bihar (supra) and Adri Dharan Das v. State of W.B. (supra).

19. In fact, the three decisions in Nirmal Jeet Kaur v. State of M.P. and Anr. (supra), Sunita Devi v. State of Bihar (supra) and Adri Dharan Das v. State of W.B. (supra) having set out the concept of the procedure to be adopted by the learned Magistrate in respect of an accused, who obtains an order under Section 438 of the said Code from the superior Court consequent to his appearance before the regular Court there cannot be any misgiving in the mind of any one with regard to the course to be followed in terms of the ratio of Nirmal Jeet Kaur v. State of M.P. and Anr. (supra), Sunita Devi v. State of Bihar (supra) and Adri Dharan Das v. State of W.B. (supra).

20. The concept of custody and arrest has been outlined in the decision of Directorate of Enforcement v. Deepak Mahajan and Anrs., (supra) in paragraph 50 wherein the Supreme Court held:

'To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences....'

21. In the present case, as also in several other instances we unfortunately had the misfortune to come across orders by the Learned Magistrate where still the earlier view is being followed and in pursuance to the appearance of the accused after obtaining an order under Section 438 of the said Code they are not taken into

custody; but, they are given an opportunity to obtain an order of bail from the higher Court.

22. While we are constrained to note such situation and we had corrected the same in several occasions as they violate the law laid down by the highest Court of the land, we find much to our chagrin that the trend has not been arrested there are yet cases where we come across such instances where the ratio of the decisions of *Nirmal Jeet Kaur v. State of M.P. and Anr.* (supra), *Sunita Devi v. State of Bihar* (supra) and *Adri Dharan Das v. State of W.B.* (supra) goes in violation.

Binding Precedent:

23. In answering the situation that has erupted in the order of the learned Magistrate we by way of a passing reference had to take note of a Division Bench decision of our Court in *Monoranjan Jana v. State of West Bengal and Anr.*(supra). The said Division Bench decision in similar fact situation relying on *Niranjan Singh and Anr., v. Prabhakar Rajaram Kharote and Ors.*, (supra) and *Sunita Devi v. State of Bihar* (supra) disposed of the same.

Cross Roads:

24. From our humble appreciation of *Nirmal Jeet Kaur v. State of M.P. and Anr.* (supra), *Sunita Devi v. State of Bihar* (supra) and *Adri Dharan Das v. State of W.B.* (supra) what we have understood is that once an accused appears before the Court in terms of an order under Section 438 of the said Code he has to be in custody to enable him to move an application under Section 439 of the said Code.

25. We cannot give the word 'custody' any polymorphous interpretation but has to read alongside the ratio of the decision of the higher Court of the land. In the said decision of *Monoranjan Jana v. State of West Bengal and Anr.*(supra) we find that the decision of *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.* (supra) was noted with approval and the said Division Bench proceeded that when the accused appeared before the learned Magistrate he could be stated to be in judicial custody when he surrenders before the Court and submits to its jurisdiction

as it was held in the case of Niranjn Singh (supra). In the present case, the petitioners surrendered before the learned Magistrate and prayed for regular bail, the learned Magistrate instead of taking them into custody, directed them to bring order from the higher Court.

26. It is quite pertinent to note that in Niranjn Singh's case (supra) the Supreme Court was dealing with a situation where the accused persons surrendered before the Sessions Judge after the applicants who were police officers applied for bail before the Magistrate, who refused bail and still the accused without surrendering before the Magistrate obtained an order for stay to move the Sessions Court and thereafter surrendered before the Sessions Judge.

27. In the instant case as also in the decision of Monoranjan Jana v. State of West Bengal and Anr. (supra) the fact situation was quite dissimilar with the ratio of the decision of Niranjn Singh and Anr. v. Prabhakar Rajaram Kharote and Ors. (supra). Pursuant to an order obtained by the applicants under Section 438 of the said Code in the said case the learned Magistrate directed the applicants to bring an order from the Superior Court. Questioning the said order application was filed before the learned Sessions Judge. The learned Sessions Judge refused such prayer keeping in mind the ratio of the decision of Sunita Devi's case (supra) as the accused were not in custody and thereafter they moved the High Court and the decision of Monoranjan Jana's case (supra) was rendered.

28. We are in great difficulty in abiding by the Division Bench decision of Monoranjan Jana's case (supra).

Law of Stare Decisis:

29. A Court is bound to follow any case decided above it or of a equal strength and are bound to by the previous decisions. Ratio decidendi of the earlier case by a superior Court or a Bench of equal strength is binding on the latter decision stare decisis.

Exceptions of Stare Decisis:

30. However, there are exceptions to the Rule of Precedence. The question though involved in a case was either not argued or considered in the said decision which is called a precedent sub silentio and cannot have any binding effect and has merely a persuasive value.

Principles of Sub Silentio:

31. We have the authority of Salmond on Jurisprudence, Twelfth Edition: P. J. Fitzgerald on this proposition:

'A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio'.

32. A well-codified principle of law has been set out in the decision of the Supreme Court in Divisional Controller, KSRTC v. Mahadeva Shetty and Anr., : AIR 2003 SC4172 :

'Therefore, while applying the decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as, obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social

justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.'

33. Recently a Constitution Bench of the Supreme Court in *Zee Telefilms Ltd. and Anr. v. Union of India and Ors.*, : AIR 2005 SC2677 held:

'266. It is further well-settled that a decision is not an authority for the proposition which did not fall for its consideration.

267. It is also a trite law that a point not raised before a Court would not be an authority on the said question'.

Similarly, the Supreme Court in *State of U.P. and Anr. v. Synthetics and Chemicals Ltd. and Anr.* : 1993(41)ECC326 , referring to one of its earlier decisions found:

'A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect....';

and that 'precedents sub-silentio and without argument are of no moment'.

34. Rupert Cross in his famous treatise 'Precedent in English Law' in chapter IV of the said book at page 144 defined the principle of sub silentio:

'In some cases the Court may make no pronouncement on a point with regard to which there was no argument, and yet the decision of the case as a whole assumes a decision with regard to the particular point. Such decisions are said to pass sub silentio, and they do not constitute a precedent.'

35. In other words, a decision operating in the field of a Bench of larger strength or equal strength is, no doubt, a precedent and has binding effect on the later Bench either of a lesser strength or even of a co-equal strength and the Rule of Stare Decisis will apply. But, where a decision, which passes sub silentio cannot be an authority and have any binding effect.

Corollary:

36. In Monoranjan Jana's case (supra) the decision of Niranjana Singh and Anr. v. Prabhakar Rajaram Kharote and Ors. (supra) of the Supreme Court was noted with approval. But, as seen by us hereinabove there the accused persons directly went to surrender before the learned Sessions Judge. In the said case it is found that the learned Sessions Judge was approached after the learned Magistrate refused to take the petitioners into custody and directed them to obtain order from the higher Court but the learned Sessions Judge declined to accede to their prayer taking the ratio of the decision of Sunita Devi's case (supra).

37. As such, Monoranjan Jana's case (supra) the pith and substance of the decision of Niranjana Singh and Anr. v. Prabhakar Rajaram Kharote and Ors. (supra) will have no application in our very humble view as the Supreme Court was dealing with a case where the accused went to surrender before the Sessions Judge directly whereas in Monoranjan Jana's case (supra) the petitioners surrendered before the learned Magistrate and they were not taken into custody and thereafter the Sessions Judge was approached under Section 439 of the said Code.

38. The context was quite different and as we find from a reading of the said decision of Monoranjan Jana v. State of West Bengal (supra) the petitioners were not in custody when they approached the superior Court for an order under Section 439 of the said Code. We, with utmost deference, feel that the same view is not in consonance with the ratio of the decision of Nirmal Jeet Kaur v. State of M.P. Anrs. (supra), Sunita Devi v. State of Bihar (supra) and Adri Dharan Das v. State of W.B. (supra).

39. As such, we are of the considered view that since the same passes sub silentio the decision of Monoranjan Jana's case (supra) will not be squarely binding.

Finding:

40. Keeping in mind the language in *Nirmal Jeet Kaur v. State of M.P. and Anr.*(supra) which demonstratively resolves this position in paragraph 22 of the said judgment which reads:

'22. For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin* case the protection in terms of Section 438 is limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody.'

41. In view of the same no other interpretation is permissible and the order of the learned Magistrate enabling the petitioners to obtain further order from appropriate authority (read superior Court) and refusing to take them into custody diametrically militates against the ratio of the decisions discussed by us, of the highest Court of the land.

Epilogue:

42. Law, as it stands in the light of the decisions of the Supreme Court, crystallizes the position that an order under Section 438 of the said Code is operative for a particular period only and within that period the regular Court (read the Court of the learned Magistrate) should have to be moved and the learned Magistrate, in the event he is not inclined to enlarge the accused on bail, would have to take into custody and it is only thereafter such an accused can prefer an application under Section 439 of the said Code before the superior Court.

43. In the light of what has been discussed we are of the opinion that the order passed by the learned Magistrate cannot be sustained as until and unless the person is in custody no prayer for bail under Section 439 of the said Code would be maintainable.

44. The view taken by the learned Single Judge is the correct position of law and we fully endorse the same.

Omega:

45. In such view of the matter the impugned order dated 21.4.05 passed by the learned Sub-Divisional Judicial Magistrate, Haldia in G. R. Case No. 159 of 2005 is set aside. The petitioners are directed to surrender before the learned Magistrate and the latter is directed to dispose of their application under Section 439 of the said Code in the ratio of the decisions of the Supreme Court laid down in of Nirmal Jeet Kaur v. State of M.P. and Anr. (supra), Sunita Devi v. State of Bihar (supra) and Adri Dharan Das v. State of W.B. (supra).

Span:

46. Since the period of two weeks for which the parent order under Section 438 was to be operative on and from 13.4.05 and although the same has lapsed on account of the aforesaid circumstances we direct that the period of two weeks would be read as operative on and from August 1, 2005.

Execution:

47. In view of the wider ramification and effect that this order contains learned Registrar is requested to send a copy of this judgment to all the District Judges, who in turn would cause circulatory information to the respective learned Chief Judicial Magistrates, additional Chief Judicial Magistrates and Judicial Magistrates holding independent charges.

48. Application, accordingly, disposed of.

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