

**In Re: Digendra Sarkar and ors.**

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**Court :** Kolkata

**Decided On :** Sep-01-1982

**Reported in :** 1982CriLJ2197

**Judge :** Amitabha Dutta, J.

**Appellant :** In Re: Digendra Sarkar and ors.

**Judgement :**

ORDER

**Amitabha Dutta, J.**

1. This Revisional application is directed against an order dt. 1-7-1982 in G. R. Case No. 563 of 1982 passed by the learned Sub-Divisional Judicial Magistrate, Alipurduar rejecting the prayer of the petitioners to accept their surrender in Court and release them on bail.

2. The point at issue in this case is whether when any person accused of or suspected of the commission of a non-bailable offence appears before a court other than the H. C. or Court of Session and submits himself to the jurisdiction and order of the Court and applies for bail, his surrender can be accepted and application can be considered or not by the said Court.

3. In this case it appears that a First Information Report was lodged with Police Station Falakata on 18-6-82 against the seven petitioners and some others

alleging commission of offences under Sections 147/148/149/450/424/324/302 of the Indian Penal Code and the Police registered Case No. 10 dated 18-6-1982 being G. R. Case No. 563/82 against the petitioners and others and started investigation. Thereafter the petitioners appeared before the learned Sub-Divisional Judicial Magistrate, Alipurduwar before whom the case was pending on 1-7-1982 and prayed for their release on bail after expressing their intention to surrender before the Court. The learned Magistrate by his impugned order relying on the decision in the case of Bhramar v. State of Orissa 1981 Cri LJ 1057 (Orissa High Court) has held that as no process has been issued against the petitioners, he is not competent to accept the surrender of the petitioners and consider their application for release on bail.

4. It has been contended by the learned Advocate appearing for the petitioners that as the petitioners have been named in the First Information Report as person who have committed the alleged offences and were wanted by the Police, they are under restraint and they have the right to surrender before the learned Magistrate and pray for bail although no process has been issued against them. On the other hand, it has been submitted by the learned Advocate appearing for the State that the petitioners have no right to surrender before the learned Magistrate and apply for bail as no process has yet been issued by the Court against them.

5. In deciding the point at issue it is necessary to refer to the relevant provisions of Section 437(1) of the Cr. P.C. which reads as follows:

When any person accused of or suspected of the commission of any non-bailable offence is arrested Or detained without warrant by the Officer-in-Charge of a Police Station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

6. It is not necessary to refer to the two provisions to that Sub-section for the purpose of this case.

7. An analysis of the aforesaid provision of Section 437(1) of the Cr. P.C. leads to the following result:

When any person accused of or suspected of the commission of any non-bailable offence applies for, bail before a Court other than High Court or a court of Session in one of the four circumstances viz.

(1) when he is arrested or

(2) when he is detained without warrant by an Officer-in-Charge of a Police Station; or

(3) when he appears; or

(4) when he is brought before a Court of registration.

the learned Magistrate may release him on bail but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

8. It is therefore plain that when a person accused of or suspected of the commission of a non-bailable offence appears before the learned Magistrate and applies for bail, the learned Magistrate has to consider the application. The learned single Judge of the Orissa High Court in the decision reported in 1981 Cri LJ 1057 has interpreted the expression 'or appears' in Section 437(1) by holding that it has been used in relation to the issue of summons. With great respect, I am unable to agree with that view as such limitations not in the provision of Section 437(1) itself Or in other words, we cannot add the words 'in obedience to a process of the Court' after the words 'or appears' in the said provision for the purpose of interpretation.

9. Section 439 of the Code provides that a High Court or Court of Session may direct that any person accused of a an offence and in custody be released on bail. The Supreme Court in the case of Niranjana Singh v. Prabhakar : 1980 CriLJ426 dealt with the meaning of the word 'custody' in Section 439 and held that the custody in the context of Section 439 of the Code (apart from the context of

Anticipatory bail under Section 438 of the Code) is physical control or at least physical presence of the accused in Court coupled with his submission to the jurisdiction and orders of the Court. The Supreme Court has observed that the person concerned is in custody not merely when the Police arrests him produces him before the learned Magistrate and gets remand to the judicial or other custody. He can be said to be in judicial custody when he surrenders before the Court and submits to its jurisdiction. In the reported case which arose out of a complaint against some Police men, the learned Magistrate after an enquiry under Section 202 of the Code issued non-bailable warrant of arrest against the accused. Thereafter the accused persons applied before the learned Magistrate for bail. The learned Magistrate refused the prayer for bail and at the same time stayed the issuance of warrant. Then the accused persons moved the learned Sessions Judge who granted them bail subject to certain conditions. The complainant moved the High Court against that order for grant of bail to the accused persons, The High Court declined to interfere. Thereafter they moved the Supreme Court and it was argued that the Respondents were accused of an offence but were not in custody and so no bail could be granted to them. The Supreme Court overruled that contention and in that connection made the aforesaid observation explaining the meaning of the word 'custody' in the context of Section 439 of the Code.

10. In my view, having regard to the express provisions of Section 437(1) of the Code and the aforesaid decision of the Supreme Court explaining the word 'custody' it must be held that when a person accused of or suspected of the commission of a non-bailable offence appears before the learned Magistrate and surrenders or submits himself to the jurisdiction and orders of the court, he is in custody, and the learned Magistrate in the present case is required to accept the surrender of the petitioners and deal with their applications for bail. Such a person is under duress and has placed himself under the power of restraint exercisable by the Court by his physical presence before the Court and expressing his intention to submit himself to the orders of the Court.

11. The provision for the anticipatory bail in Section 438 of the Code applies even when there is no 'First Information Report and no case for commission of a non-bailable offence has been registered against a person. If a person has reason to

believe that he may be arrested on an accusation of having committed a non-bailable offence, although no 'First Information Report' was filed against him, he may appear before the Court and apply for an order for his release on bail in the event of his arrest. The filing of a 'First Information Report' is not a condition precedent to the application for anticipatory bail and in such a case, the person having reason to believe that he may be arrested on an accusation of non-bailable offence may appear before the High Court or the Court of Session, not for the purpose of being taken into custody of the Court but for getting an order for his release in case he is arrested. No doubt, even after a 'First Information Report' is lodged against such a person, he will be at liberty to appear before the High Court or Court of Session and apply for anticipatory bail without surrendering himself to the jurisdiction and orders of the Court in the matter of his custody as an accused, But although such a course is left open to the person, he may as well appear before the learned Magistrate having jurisdiction and submit himself to the orders of the Court regarding grant of bail to him or taking him into custody. In view of the foregoing discussion I find that the impugned order of the learned Magistrate is not sustainable and should be set aside.

12. The Revisional application therefore succeeds. The impugned order of the learned Magistrate is set aside. He is directed to accept the surrender of the petitioner, if they appear and surrender themselves before him and consider their application for bail after giving notice to the State.

13. The application is thus disposed of.

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