ORISSA HIGH COURT: CUTTACK

BLAPL No. 1670 of 2022

(Application under Section 439 of Cr.P.C.)

AFR	Pradeep Kumar Sethy	.....	Petitioner
	-Versus-		
	State of Odisha	.....	Opp. Party

Advocate(s) appeared in these cases:-

For Petitioner	:	Mr. Milan Kanungo, Sr. Advocate along with M/s. G.R. Jena, C. Mishra & Ms. Chandana Das Advocates
For Opp. Party	:	Mr. P. Tripathy, Addl. Standing Counsel

CORAM
JUSTICE SASHIKANTA MISHRA

ORDER
14th July, 2022

SASHIKANTA MISHRA, J. An FIR was lodged by Lala Aswini Prasad Ray, Ajit Kumar Ray and Banoj Behera before Jagatsinghpur Police Station on 13.05.2013 alleging that a private non-banking institution, namely, Artha Tatwa

collected huge amounts from the depositors through its branch office. The present petitioner is said to be the CMD of the said firm. It is alleged that he along with other employees, namely, Prasanta Swain, Manoj Pattanaik and others conspired among themselves to lure gullible depositors to deposit money under different schemes floated by the said firm with the promise of handsome returns. It is stated that a sum of nearly 25 Crores was collected thereby. When the deposited amounts along with the promised returns thereon were not repaid, the depositors wanted to meet the officers of the firm. While some of them were not traceable, the others gave out that nothing would be refunded to them. Alleging that the entire amount of Rs.25 Crores of different depositors was misappropriated by the firm through its officers including the present petitioner, the aforementioned FIR was lodged, leading to registration of Jagatsinghpur P.S. Case No. 103 (11) dated 10.05.2013 under Sections 420/506/34 of IPC showing the present petitioner and other officers as the accused persons which corresponds to G.R. Case No.411 of 2013 of the Court of learned S.D.J.M., Jagatsinghpur.

On 25.06.2013, the I.O. of the case prayed before learned S.D.J.M., Jagatsinghpur for remand of the present petitioner and the co-accused, Manoj Pattnaik as they were then in custody in connection with Kharavelanagar (Bhubaneswar) P.S. Case No. 44 of 2013. Accordingly, learned S.D.J.M., Jagatsinghpur passed an order to send a W.T. Message to the S.D.J.M., Bhubaneswar asking whether the said accused could be spared to his court. While the matter stood thus, charge sheet was submitted on 06.08.2013 under Sections 420/506/120-B/406/467/468/471/34 IPC read with Sections 4, 5 & 6 of Prize Chits and Money Circulation Schemes (Banning) Act, 1978 showing the petitioner as 'Remanded'. While the matter stood thus and the case was being adjourned from time to time for production of the accused, Pradeep Sethy and others, the petitioner moved an application for bail on 24.01.2022 before the learned S.D.J.M., Jagatsinghpur, which came to be rejected on the same day. The petitioner thereafter approached the Court of Session for bail under Section 439 of Cr.P.C.. The said application also came to be rejected by order dated

16.02.2022 passed by learned Sessions Judge, Jagatsinghpur on the ground that the accused had not been produced or remanded in the case at hand, i.e., G.R. Case No.411 of 2013 of the Court of learned S.D.J.M., Jagatsinghpur nor had surrendered before the Court and therefore, the petition under Section 439 Cr.P.C. is not maintainable. The petitioner has thereafter moved this Court seeking bail.

2. Heard Mr. Milan Kanungo, learned Sr. Counsel with Ms. Chandana Das, learned counsel appearing for the petitioner and Mr. P. Tripathy, learned Addl. Standing Counsel for the State.

3. Mr. Kanungo argues that though the FIR was registered on 10.05.2013, the petitioner was produced physically before the trial court on 22.03.2022 but the same cannot be treated as the date of first production because the I.O. had prayed for his remand way back on 25.06.2013, but the Court had failed to act upon the same. Mr. Kanungo further submits that on the prayer of the I.O., learned S.D.J.M., Jagatsinghpur passed order for sending W.T. message to the learned S.D.J.M.,

Bhubaneswar to spare the accused but thereafter everything was stalled till 22.03.2022. In the meantime, the petitioner has spent nearly nine years in custody.

Mr. Kanungo further argues that the offences being under Sections 420/506/120-B/406/467/ 468/471/34 IPC and Sections 4, 5 & 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, the petitioner, if convicted, can be sentenced for a maximum term of seven years. The petitioner has spent more than such period in custody. Assailing the finding of learned Sessions Judge that the petitioner was not physically produced, Mr. Kanungo has argued that the petitioner must be deemed to have been remanded in this case or deemed to be in custody in the present case. To buttress his contention, Mr. Kanungo has relied upon the decision of the Supreme Court in the case of ***Government of Andhra Pradesh and Ors. Vs. Anne Venkatesware and Ors.,*** reported in AIR 1977 SC 1096 and a Full Bench decision of the Allahabad High Court in ***Shabbu and Ors. vs. State of U.P. and Ors.,*** reported in 1982 CriLJ 1757. On such basis, it is forcefully contended that the

petitioner must be deemed to be in custody from the date of lodging of the FIR in the instant case, i.e. 10.05.2013. It is also argued that the provisions of Section 436-A of Cr.P.C. are required to be taken note of. In this regard, Mr. Kanungo has cited the decision of the Apex Court in the case of ***Bhim Singh vs. Union of India*** reported in (2015)13 SCC 605.

Summing up his arguments, Mr. Kanungo would submit that the petitioner being in deemed custody for more than nine years and his non-production before the court being entirely attributable to the concerned authorities, his application under Section 439 Cr.P.C. is maintainable.

4. Per contra, Mr. P. Tripathy, learned Addl. Standing Counsel has argued that though the I.O. prayed for remand of the petitioner on 25.06.2013, yet the same was never acted upon. As per Section 439 Cr.P.C., bail can be granted to a person accused of an offence and in custody. Here, the petitioner has never been in custody in the present case being neither arrested nor remanded. His custody in another case cannot be treated as custody in so

far as this case is concerned and therefore, the petition under Section 439 Cr.P.C. was rightly held by learned Sessions Judge as not maintainable.

5. In order to appreciate the rival contentions, it would be proper to refer to the relevant part of Section 437 of Cr.P.C. which is extracted as under:

> ***"437. When bail may be taken in case of non-bailable offence.—*** *(1) When any person accused of, or suspected of, the commission of any 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 other than the High Court or Court of session, he may be released on bail, but—*
> *Xx xx xx"*

Thus, to invoke the provision of Section 437 Cr.P.C. certain pre conditions are required to be satisfied, such as, the person concerned must be arrested without warrant **or** appears **or** is brought before a court other than the High Court **or** Court of Session before he is released on bail.

Section 439(1) of Cr.P.C. however, reads as follows;

> ***"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;*

xx xx xx"

(Emphasis supplied)

6. Thus to invoke the provision under Section 439 Cr.P.C., a person must be accused of an offence **and** in custody. According to learned State Counsel, the petitioner was never in custody in connection with the present case. His custody in connection with some other case cannot be treated as custody in the present case so as to entitle him to invoke the provision under Section 439 of Cr.P.C..

7. As has already been narrated hereinbefore, the FIR was registered on 10.05.2013 and the I.O. prayed for remand of the petitioner on 25.06.2013. He was actually remanded/physically produced on 22.03.2022, i.e., nearly nine years later. Now, what transpired during all these years is completely shrouded in mystery. The order sheet of G.R. Case No. 411 of 2013 of the Court of

learned S.D.J.M., Jagatsinghpur reveals that on the prayer for remand being made by the I.O. on 25.06.2013, learned S.D.J.M., Jagatsinghpur passed order to send WT message to S.D.J.M., Bhubaneswar regarding sparing of the accused as he was in custody in connection with Kharavelnagar P.S. Case No. 44 of 2013. Whether the W.T. message was actually sent, and if so, why it was not replied to within a reasonable time, is not known. The lower court case record reveals that a Memo was filed by the counsel for accused Pradeep Sethy before learned S.D.J.M., Jagatsinghpur on 25.02.2022 informing that he is 'now' in jail custody in Circle Jail, Berhampur in connection with G.R. 129/2013 and GR 732/2013 and therefore prayer was made to take necessary steps for his production (and of his co-accused) before the said court to ensure speedy trial. On the same day, presumably acting on the aforesaid memo, learned S.D.J.M. wrote a letter to the P.O., OPID Court, Berhampur to spare accused Pradeep Sethy for one day for the purpose of remand in G.R. Case No. 411 of 2013 arising out of Jagatsinghpur P.S. Case No.103/2013. Learned P.O., OPID Court,

Berhampur agreed to spare the accused by his letter dated 17.03.2022 whereupon, the accused was actually produced before learned SDJM, Jagatsinghpur on 22.03.2022.

The above narration of events occurring between 25.06.2013 to 22.03.2022 presents a very sorry state of affairs in the whole system. Learned Senior Counsel, Mr. Kanungo has referred to the concept of "deemed custody", to argue that the FIR having been registered way back on 10.05.2013, the petitioner must be deemed to have been in custody since that date, because no steps were taken by the appropriate authorities to produce him before the court. Further, he being in custody in connection with another case obviously could not have surrendered before the learned S.D.J.M., Jagatsinghpur and therefore, the only way he could have come to custody in connection with the present case is by being remanded, which the concerned authorities failed to do.

8. In the case of ***Anne Venkatesware*** (supra), the apex court held as follows:

> *"xxxxxxxxxx. We do not find any justification in law for the position taken up by the State. Rao being already in custody, the authorities could have easily produced him before the Magistrate when the first information report was lodged. Nothing has been pointed out to us either in the preventive detention law or the Code of Criminal Procedure which can be said to be a bar to such a course. That being so we think that the claim that the entire period from December 19, 1969, when many of the co-accused were produced before the Magistrate, to April 18, 1970 should be treated as part of the period during which Rao was under detention as an undertrial prisoner, must be accepted as valid. A.V. Rao's Appeal 484 of 1976 is allowed to this extent."*

9. In so far as "in custody" in relation to Section 439 Cr.P.C. is concerned, in the case of ***Niranjan Singh vs. Prabhakar,*** reported in AIR 1980 SC 785, the Apex Court held as follows:

> *"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.*
>
> *The apex court further held that no person accused of an offence could move the court for bail under section 439 of the code unless he is in custody."*

10. Relying upon the aforesaid decision, the Andhra Pradesh High Court in the case of ***Tupakula***

Appa Rao vs. State of A.P. reported in I (2002) CCR 528, the Apex Court held as follows :

> *"9. It is obvious from the above judgments of the apex court that one need not be arrested and produced before the court for the purpose of remand to the judicial custody of the Court. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. However his physical control or at least physical presence coupled with submission to the jurisdiction and orders of the court is a sine qua non. Be it on the production by the investigating agency or on the own volition of the accused surrendering himself to the custody of the court, unless one is in the custody, his request for bail cannot be considered in terms of section 439 of the code.*

11. But what would be the position if the person is already in custody in connection with some other case has been dealt with by a Full Bench of the Allahabad High Court in the case of ***Shabbu*** (supra). The Court observed as under:

> *"Whether or not the detention of a person in one case should also be treated to be his detention for the purpose of any other case, wherein he is wanted is a question to be decided upon the facts and circumstances of each case. No set formula can be laid down in that behalf. If the facts and circumstances of a particular case indicate that a person already detained in one case was also subsequently wanted in another case and he was not formally detained in that other case on account of the negligence of the concerned authorities, and for no fault of his, he can, with all justification,*

> *claim that his detention in the earlier case should also be deemed to be his detention for the purposes of the second case. In that event benefit of Section 428 Cr. P.C. can be extended to him"*

Though the above observations were made in the context of Section 428 of Cr.P.C., an analogy can be drawn at least on the underlying principle to the present case which is relatable to Section 439 Cr.P.C. While it is true that unless a person is in custody he cannot move an application under Section 439 Cr.P.C and therefore, he is to be either arrested/remanded and taken to custody thereby, but what would happen if he is in custody in some other case, which obviates the possibility of his physical surrender to the court. Obviously, he can only be produced and remanded in the case in question. This was attempted to be done as already stated hereinbefore, though it was never carried to its logical conclusion. As a result, the valuable right of the accused to move an application under Section 439 Cr.P.C. was automatically frustrated and as long as nine years passed by in the meantime. This is a serious infraction of the petitioner's fundamental right to liberty guaranteed under Article 21 of the Constitution of India. To reiterate, only for the negligence and inaction of

the concerned authorities, in this case the concerned courts, the petitioner could not be remanded in this case though such a prayer was made by the I.O. way back on 25.06.2013. This Court therefore, finds considerable force in the submission of learned Senior Counsel that the petitioner's right to move for bail was seriously infringed. In any case, having regard to the law laid down by the Apex Court in the case of ***Anne Venkatesware*** (supra) as followed by the Full Bench of the Allahabad High Court in the case of Shabbu (supra), the petitioner must be deemed to have been custody in connection with the case in question since the date of registration of the FIR, i.e., 10.05.2013.

12. The lackadaisical manner in which the matter has been dealt with is a case for serious concern as it strikes at certain fundamental pillars of not only criminal procedure but also the Constitutional principles of liberty. This is a classic case where the petitioner, for no fault of his own, was deprived of making a legitimate prayer for being released on bail. Viewed differently, this is a case where the continued inaction of the concerned

authority/Courts resulted in serious violation of fundamental right of the petitioner to seek his liberty. Whether bail is to be granted on merits or not is a different question, but to prevent a person from moving for bail and that too, purely on technical grounds is something that cannot meet with the sanction of law.

13. Having regard to the foregoing discussion therefore, this Court holds that the petitioner is deemed to have been in custody since 10.05.2013 and therefore, his application for bail under Section 439 Cr.P.C. is maintainable. Further, having regard to the fact that charge sheet has already been filed and the petitioner has spent more than nine years in custody by now in connection with the present case, this Court finds no reason to detain him in custody any longer. The bail application is therefore, allowed. Let, the petitioner be released on such terms and conditions as may be imposed by the court in seisin over the matter including the condition that he shall personally appear before the trial court on each date of posting of the case without fail.

14. Before parting with the case, this Court deems it proper to call for reports from learned S.D.J.M., Jagatsinghpur and learned S.D.J.M., Bhubaneswar explaining as to under what circumstances and for what reason the order dated 25.06.2013 passed by learned S.D.J.M., Jagatsinghpur was not acted upon for as long as nine years. The reports as above should be submitted to this Court by 4th August, 2022.

15. List this matter on 05.08.2022.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 14th July, 2022/ A.K. Rana