

Sarat Kumar Phukan Vs. Charan Deka and anr.

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Court : Guwahati

Decided On : Apr-04-1983

Judge : T.C. Das, J.

Appellant : Sarat Kumar Phukan

Respondent : Charan Deka and anr.

Judgement :

T.C. Das, J.

1. The petitioner herein has filed this application under Section 438, Criminal P. C, for grant of anticipatory bail In the event of his arrest in connection with a complaint Case No. 59 (C) of 1982 pending in the Court of the Judicial Magistrate First Class, Gauhati. While this petition was moved on 19-4-82, this Court granted ad interim anticipatory ball to the petitioner subject to his execution of a personal bond of Rs. 1,000/- on his appearance before the learned Judicial Magistrate First Class, Gauhati, by 20-4-82, in connection with the said complaint case. Thereafter, the matter came up for hearing on 13-5-82 and this Court heard the learned Counsel for the petitioner, the learned Counsel for the State and the learned Counsel for the complainant opposite party, A prayer was made on behalf of the complainant for allowing him sometime to file affidavit in opposition. However, the prayer was granted. But, as the petitioner was released on bail in pursuance of this Court's order dt. 19-4-82, the Misc. case was disposed of with liberty to the

complainant opposite party to file his affidavit in opposition and if necessary to rehear the matter again if substantial cause and legal grounds are shown as against the prayer for anticipatory bail,

2. On submission of the affidavit in opposition, the matter was further taken up for hearing and I heard the learned Counsel for the parties on 11-8-82. But, the order could not be passed as I had to leave for Imphal to hold a Division Bench and thereafter also due to intervention of long vacation of the High Court.

To get the track of the case, it would be proper to state the facts very briefly which would facilitate to appreciate the respective rival contentions of the learned Counsel of the parties in this triangular fight.

The facts;

3. The petitioner herein is the Deputy Superintendent of Police, Law and Order and is posted at capital complex, Dispur Police Station at Gauhati. The petitioner could learn that a complaint was filed against him by the opposite party (complainant) Sri Chanan Deka in the Court of the Judicial Magistrate First Class at Gauhati under Sections 307/326/325/223/352/ 355/506, I.P.C., on an occurrence which was alleged to have taken place in the night of 8th/9th January, 1982. In the said complaint petition, the complainant alleged that he was assaulted by the petitioner while effecting his arrest. The complainant was produced before the Chief Judicial Magistrate, Gauhati, in connection with a case registered at the Police Station, Dispur, on 1-1-1982 against him on the basis of an information lodged by one Lohit Barman, Sub-Inspector of Police of Dispur Police Station under S, 3, Indian Explosive and Substance Act. The allegations and counter allegations of both the cases, namely, allegations made in the case filed by the complainant and the case registered in the Police Station at Dispur against the complainant, may not be of much importance to be stated in this case as it would not be at all relevant to dispose of the present petition.

4. In the present case, the learned Judicial Magistrate First Class, Gauhati, on taking cognizance of the case against petitioner, issued bailable warrant of arrest against him. The petitioner, however, did not know about issuance of such

bailable warrant as it was not served upon the petitioner. The petitioner, thereafter, came to know that a non-bailable warrant of arrest was issued on 16-3-1982 against him. Therefore, in apprehension of arrest in view of such issuance of non-bailable warrant, the petitioner through his advocate moved an application before the learned Judicial Magistrate with a prayer to re-call the non-bailable warrant of arrest and for permission for representation through an advocate on 7th April, 1982, which was the date fixed for appearance of the accused. The prayer of the petitioner was turned down by the learned Judicial Magistrate. Therefore, the petitioner has approached this Court with this application under Section 438, Cr. P. C., to grant an anticipatory bail. The petitioner, by a separate application, has also moved this Court to quash the entire proceedings which is now pending for disposal. However, this Court is now only to consider the application for anticipatory bail under Section 438, Cr. P. C., and no more.

5. Before considering the rival contentions of the respective parties, I feel it necessary to observe the legal position of S: 438, Cr. P. C. In *Gurbaksh Singh Sibbia v. State of Punjab* : 1980 CriLJ1125 , the Supreme Court, while discussing the scope of Section 438, Cr. P. C, have held as follows (para 35) :

Section 438(1) lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has reason to believe that he may be arrested for a non-bailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mero 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively, because it is then alone that the .court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure individual's liberty; it is

neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely'. The power under Section 438 is applicable to cases where the charge is itself of a frivolous nature. In order to prevent the humiliation of the offender, it may be a proper case to exercise the jurisdiction if the allegation appears, to be mala fide and stems from ulterior motive. The jurisdiction under Section 438, Cr. P. C, can be exercised on two conditions, namely, on an existing accusation, and on reasonable apprehension of arrest on the basis of such an accusation. Thus, the petitioner must show that there is sufficient material on records upon which the Court can be satisfied with the allegations of such accusation which appears to be false and groundless.

6. The interpretation as to the application of Sections 437 and or 438, Cr. P. C. in a particular case is no longer res integra. The Division Bench of this Court in State of Assam v. Mubarak Ali reported in (1982) 1 Gauhati LR 377 : 1982 Cri LJ 1816, (Wherein Hon'ble Lahiri, J. who spoke for the Court) has fully discussed the scope and application of Section 437 as well as Section 438, Cr. P. C, and concluded that the ambit and scope of Section 438 is quite distinct and separate from Section 437 of the said Code. This court while dealing with the scope of the two provisions of Cr. P. C, namely, Sections 437 and 438, has held 'the ambit and scope of Section 438 are quite distinct and separate. A direction for grant of bail to a person apprehending arrest can be made in favour of a person who apprehends arrest. No application under Section 438 can be made by a person tendered or arrested by the police. The applicant need not appear in Court nor should be brought in Court, He cannot be granted bail by the court forthwith. He can only get a direction from Court that in the event of his arrest he may be enlarged on bail by the police. Therefore, the distinctive features are that in Section 438(i) the applicant need not be an accused person; (ii) he need not be brought before a Court; nor his appearance in Court is a condition precedent; he may apply without personally appearing before the court; (iii) the applicant need not surrender to the physical control of the Court nor need he submit to the custody of the court; (iv) the application must be for anticipatory bail in the event of his arrest. Therefore, on arrest no application under Section 438 is maintainable; (v) the court cannot direct that he should be released on bail forthwith. It can only make a direction that in the event of his arrest he should be released on bail. The authority to grant bail is the

Officer-in-charge of the police station if the applicant is wanted to be arrested without warrant on such accusation. The extraordinary power to make direction for grant of bail cannot be exercised by the Magistrate directly or indirectly. It can only be exercised by the High Court or the Court of Session. This view was taken relying on *Niranjan Singh v. Pra-bhakar* : 1980 CriLJ426 . In that decision it was stated that where an accused appears and surrenders before the Court, it can be held that he was 'in custody' of the Court. In *Niranjan's* case, their Lordships have observed that a person can be stated to be in judicial custody when he surrenders before the court and submits to its jurisdiction. In *Mubarak's* case the term 'appearance' was explained which means and includes voluntary appearance before the court without intervention of any agency and the act of surrender before the court coupled with submission to its direction. In *Sri Kiran Chandra Goswami v. State of Assam* (1982) 1 Gauhati LR 385, the learned single Judge also took the same view. The same view has been accepted by a Division Bench of this Court in *Kh. Senajaoba Singh v. State of Manipur* in Criminal Misc. Case No. 1 of 1979 disposed of on 4-9-82. Therefore, the relative scope as to the applicability of the application under Section 438, Cr. P. C, for anticipatory bail and the circumstance under which it can be granted and the duty of the court dealing with such an application has been fully , indicated while discussing the scope and ambit of Sections 437 and 438, Cr. p. C, by this Court relying upon the view taken by their Lordships of the Supreme Court.

7. The bone of contention of Mr. Tulsi, the learned Counsel for the petitioner is that the learned Magistrate while taking cognizance of the complaint case of Sri Charan Deka issued bailable warrant and thereafter without awaiting as to whether it was served or not, and without obtaining report for satisfaction of its service or non-service upon the petitioner, issued non-bailable warrant even on knowing the fact that the petitioner is a Government servant discharging his duties as Police Officer at capital complex, Dispur Gauhati. Moreover, the question of avoiding appearance in Court cannot be in any manner a matter of apprehension in the mind of the Magistrate. Even in spite of this, the issuance of non-bailable warrant appears to be out of bias and without application of mind in discharging the judicial duty which amounts to a capricious and wrong and illegal exercise of jurisdiction. Therefore, according to the learned Counsel for the petitioner, it is a fit case where

the High Court should exercise its jurisdiction to grant anticipatory bail to the petitioner in the event of his arrest in pursuance of the non-bailable warrant issued against him. The learned Counsel has further submitted that while issuing the rule on this application, this Court granted bail and the petitioner is still continuing to remain on bail till the disposal of the other application praying for quashing the entire proceedings of the complaint case against the petitioner. In this context the learned Counsel has submitted that this application for anticipatory bail being maintainable may be accepted by this Court. ,

8. I have also heard Mr. Rajendra Singh, the learned Senior counsel, representing the State of Assam in this case. Mr. Singh has assisted the Court in advancing his submission only in respect of the scope and applicability of Sections 437 and 438, Cr. P. C, respectively in an appropriate case. Mr. S. Medhi, the learned Counsel for the complainant Charan Deka, on the other hand, has vehemently argued that in view of the facts and circumstances of the case the application for anticipatory bail is absolutely not maintainable as because the petitioner has already appeared in the court of the learned Judicial Magistrate through his advocate by filing an application for recalling the warrant of arrest with a further prayer to allow him to be represented through lawyer in the proceedings. ' Mr. Medhi has further submitted that the petitioner has filed this application for granting anticipatory bail against the order of the learned Judicial Magistrate who rejected his prayer on both the counts. Therefore, according to learned Counsel, as the petitioner has already surrendered before the Court, the application for granting anticipatory bail by invoking the jurisdiction of this Court under Section 438, Cr. P. C., is not tenable. The further submission of Mr. Medhi is that no anticipatory bail application can be lodged before this Court against the order dt. 8-2-82 and the order dt. 16-3-82 passed by the learned-Judicial Magistrate in respect of which the petitioner has already filed a petition for quashing the entire proceedings,

9. The learned Counsel for the parties in this context, have relied upon the decision of the Supreme Court as reported in : 1980 CriLJ1125 Gurbaksh Singh Sibbia v. State of Punjab and made their respective submissions about the nature, scope and applicability of Sections 437 and 438, Cr, P. C, in an appropriate case.

10. Now the most important question in this case is to see as to whether the petitioner by filing an application (a) for recalling the warrant of arrest and (b) for allowing him to be represented by a lawyer in the proceedings amounts to his 'surrender' in Court. In para 14 of the petition, the petitioner has stated. 'The petitioner submits that he had moved an application in the court of the learned Magistrate for recalling of warrant and for permission to represent through an advocate on 7-4-1982. The learned court however, refused both the prayers made by the petitioner'. If the petitioner in the true sense has surrendered before the court by making an appearance through his advocate with an application for the above-noted prayers, can it be said that he is in custody of the court? If the answer is in affirmative, then the question will arise as to whether there is any scope for an application praying for anticipatory bail under Section 438, Cr. P. C, either to this Court or in the Court of Session as the case may be can be entertainable. The answer to this question appears to be clear if we turn to the decision of the Division Bench case of this Court in Mubarak's case 1980 Cri LJ 1816(supra). In Niranjan Singh's case 1980 Cri LJ 426(supra) their Lordships of the Supreme Court had clearly stated.-He can be stated to be in Judicial custody when he surrenders before the court and submits to its discretion'. In the instant case, the petitioner had appeared before the learned Magistrate's court without intervention of any agency as because the petitioner apprehended that he would be arrested in pursuance of the non-bailable warrant of arrest issued against him by the learned Judicial Magistrate with a prayer to recall the same. Therefore, the only point for consideration at this stage appears to be as to whether this Court can invoke the jurisdiction under Section 438, Cr. P. C, in the present nature and circumstances of the case. Mr. Singh, the learned senior advocate, appearing on behalf of the State, in course of his submission, has stated that the true test as to the nature and scope of the provisions of Sections 437 and 438, Cr. P. C, has been dealt with by their Lordships of the Supreme Court in the case reported in AIR 1980 SC 1632 : 1980 Cri LJ 1125(supra). In the said decision their Lordships have held:

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It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-

bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the state at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

In para 15 of the said judgment, their Lordships have held:

Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail' which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the Court, by providing that it may grant bail 'if it thinks fit'. The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law.

I have already quoted in the earlier portion of my judgment about the ambit, scope as well as the applicability of Section 438, Cr. P. C, as laid down by their Lordships

of the Supreme Court in para 35 of Gurbaksh Singh's case.

11. Considering the ratio of the above referred decision of their Lordships of the Supreme Court as well as of the Division Bench of this Court, and on hearing the rival contentions of the learned Counsel for the parties, I am of the opinion that while the petitioner himself had surrendered before the learned Judicial Magistrate with an application praying for granting of some relief though refused by the Court, amounts to an 'appearance' before that court and also amounting to 'submission of jurisdiction' of the said Court. Therefore, at this stage the scope for this petition for granting anticipatory bail does not arise. The remedy of the petitioner is only to invoke the provisions of Section 437, Cr. P. C. before the learned Judicial Magistrate who on receipt of the application for bail shall grant bail to the petitioner under Section 437, Cr. P. C, on the term and condition as it may be deemed fit and proper under the law. The learned Judicial Magistrate shall take into consideration that the petitioner being a responsible Police Officer discharging his duties in maintaining Law and Order must be allowed to go on bail forthwith as and when he makes an appearance before the court so that the duty rendered by the petitioner to the public at large may not suffer. This direction is made in view of the fact that the petitioner has already been granted bail by this Court with a further direction to remain on bail.

12. In the result, this Misc. case is disposed of with the above direction.

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