

Utpal Sharma Vs. State of Assam

Utpal Sharma Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/137822

Court : Guwahati

Decided On : Feb-27-2004

Judge : A.H. Saikia, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 362 and 438

Appeal No. : Bail Application No. 335 of 2004

Appellant : Utpal Sharma

Respondent : State of Assam

Advocate for Def. : F.H. Laskar, Adv.

Advocate for Pet/Ap. : B.C. Das, Adv.

Disposition : Application dismissed

Judgement :

A.H. Saikia, J.

1. Heard Mr. B. C. Das, learned counsel for the petitioner. Also heard Mr. F. H. Laskar, learned PP, Assam.

2. The petitioner has moved this application under Section 438 Cr.PC for the second time apprehending arrest in connection with Jalukbari. P.S. Case No. 352/03 registered Under Section 458/427/506/34 IPC. In paragraphs 5 and 6 of

this application he has fairly mentioned that on earlier occasion, an application for pre-arrest bail, commonly termed as anticipatory bail, was preferred but the same was rejected by this court and this second application has been filed on a fresh ground stating that he has been suffering from severe infection of Hepatitis with peptic ulcer disease for which Doctor has advised him for immediate hospitalization,

3. The new change of circumstances or development of fresh situation, after rejection or disposal of an application filed under Section 438 Cr.PC earlier, cannot be accepted as a ground for filing a second application for pre-arrest bail under the said section. The second or subsequent application, after rejection, and disposal of the earlier application for pre-arrest bail, is not maintainable. Section 438 Cr.PC does not contemplate for moving such a second application for anticipatory bail in the same court, once prayer for such benefit is refused either by the Court of Session or the High Court.

4. For the sake of convenience, the provision of Section 438(1) may be noticed as under :

'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,'

5. From a close perusal of a legal provision fore noted, it appears that there must be an accusation against the person concerned, of having committed a non-bailable offence for which he has reason to believe of getting arrested. On such condition precedent, he may approach either the High Court or the Court of Session for a direction that he may be released on bail in the event of such arrest. In the backdrop of this provision of law, it can be said that the development of new circumstances cannot change the 'accusation' and as such there cannot be any revival of 'reason to believe' of apprehension of arrest which was already considered by the court in first application for pre-arrest bail. Moreover, an order of the rejection or dismissal of an application under Section 438 Cr.PC passed upon

hearing the learned counsel of the rival parties and on careful consideration of the materials available on records or allegations made in the first information report, becomes a final order and since it gets the finality, such final order would be covered by the provisions of Section 362 Cr.PC, whether or not they amount to 'judgment'. Section 362 Cr.PC provides as under :

'362. Court not to alter judgment. -- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.'

6. In view of this provision, the entertainment of a second application for anticipatory bail, in my view, would amount to review or alter and/ or reconsider the earlier final order passed by the Court. After the final disposal of the application of such nature, the court becomes functus officio and therefore it is not permissible to entertain, the second application for anticipatory bail unless the earlier final order is set aside by the Higher Court. There is absolutely no scope either for review or reconsideration of the prayer for granting anticipatory bail again once earlier application under Section 438 Cr.PC is rejected or dismissed. But this principle shall not be applicable in case of final disposal, of an application under Section 438 Cr.PC granting, the privilege of anticipatory bail which is always subject to judicial scrutiny under the law. At the same tune, it is worth mentioning that in case of rejection of an application for anticipatory bail by the Sessions Court, the aggrieved party shall be at liberty to approach the High Court under Section 438 Cr.PC for consideration of his anticipatory bail on the ground of changed circumstances as well as fresh material.

7. Mr. Laskar, Learned PP, Assam, in this connection has referred to a recent Full Bench decision of the Calcutta High Court reported in 2003 Cri.LJ 1 (Maya Rani Guin and etc. v. State of West Bengal) wherein it was held in paragraphs 20 and 21 that entertaining a second application for anticipatory bail would amount to review or reconsideration of the earlier order passed by the court as the accusation remains unchanged. The accusation, being the sine qua non and which remains same, there cannot be any revial or 'reasons to believe' of

apprehension of arrest which was considered by the court in the earlier application for anticipatory bail. It was further held that the second application for anticipatory bail even if new circumstances develop after rejection or disposal of the earlier application, is not maintainable.

8. This court does concur with the view expressed in the Maya Rani's case (supra). Consequently, upon hearing the learned counsel for the parties and also on perusal of the materials available on case diary as well as having regard to the above cited case, this court is of the view that this application moved under Section 438 Cr.PC for the second time is not maintainable and cannot be entertained.

9. In the result, this bail application stands dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com