

H.S. Manjunath and Another Vs. State of Karnataka and Another

H.S. Manjunath and Another Vs. State of Karnataka and Another

SooperKanoon Citation : sooperkanoon.com/373902

Court : Karnataka

Decided On : Sep-29-1994

Reported in : 1995(1)ALT(Cri)226; 1995(1)ALT(Cri)226; 1995CriLJ179; ILR1994KAR3302; 1995(1)KarLJ50

Judge : J. Eswara Prasad and;S.A. Hakeem, JJ.

Appeal No. : Cr. P. Nos. 1601 and 1682 of 1994

Appellant : H.S. Manjunath and Another

Respondent : State of Karnataka and Another

Advocate for Def. : N.K. Ramesh, G.P.

Advocate for Pet/Ap. : B.N. Shetty and ;N. Hegde, Advs.

Judgement :

J. Eswara Prasad, J.

1. The question that arises for consideration in both these criminal petitions is whether the High Court or the Sessions Court can grant bail to the petitioners under section 438 of Cr. PC while they are accused of the offences punishable under the Karnataka Forest Act, 1963 ('the Act' for short) and apprehend arrest at the hands of the Range Forest Officer.

2. The petitioners in Cr.P. Nos. 1601 and 1682 of 1994 are accused of offences under sections 84, 86, 87 and 71(a) of the Act and FIRs were filed before the JMFC, Thirthahalli in Crime Nos. 154/94 and 177/94 respectively. Apprehending arrest, the petitioners filed petitions before the Principal Sessions Judge, Shimoga under section 438, Cr. PC for the grant of anticipatory bail. The learned Sessions Judge dismissed the petitions holding that the petitions are not maintainable, following the decision of the learned single Judge in Shankar Nayak v. State of Karnataka (1991 Cri LJ 1468). The petitioners filed Cr.P. Nos. 1601 and 1682 of 1994 which were heard by the learned single Judge and the matters are referred to the Division Bench as there was a conflict of decisions in 1991 Cri LJ 1468 (Kant) and in Gaffarsab v. State of Karnataka (1991 (1) Kar LJ 12) : (1991 Cri. LJ 2136).

3. The learned counsel for the petitioners contended that Section 438, Cr PC empowers the High Court and the Sessions Court to grant anticipatory bail to any person apprehending arrest at the hands of a police officer or any other officer empowered to arrest under any other law and that the decision of Ramachandraiah, J., in Shankar Nayak's case 1991 Cri LJ 1468 (Kant) (supra) is not correct as the same learned Judge took a view in Gaffar Sab's case 1991 Cri LJ 2136 (Kant) (supra) that anticipatory bail can be granted, which represents the correct view. On the other hand, the learned Government Pleader contends that anticipatory bail cannot be granted as no directions can be issued to a Forest Officer or any other officer who is not a police officer within the purview of sub-Section (3) of Section 438, Cr.P.C.

4. In order to appreciate the rival contentions it is necessary to set out Section 438, Cr PC. :-

'438 (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 facts 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.

(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 decided that a warrant should issue in the first instance against that person, he shall issue aailable warrant in conformity with the direction of the Court under sub-section (1)'.

5. A reading of sub-section (1) of Section 438, Cr.P.C. would show that the provision is substantive in nature. The High Court or the Court of Session, if it thinks fit may direct release on bail any person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. There is nothing in sub-section (1) to indicate that the apprehension of arrest should be only by a police officer and none other. Under sub-section (2), while granting an order under sub-section (1), directions may be issued including the directions mentioned in clauses (i) to (iv) of sub-section (2). Under sub-section (3), directions may be issued directing that if such a person is arrested without warrant by an officer in charge of a police station, he shall be released on furnishing bail if

a Magistrate taking cognizance of such a case decides that a warrant should issue in the first instance, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). While sub-section (1) is substantive in nature sub-sections (2) and (3) are procedural.

6. In *Balchand Jain v. State of Madhya Pradesh* (AIR 1977 SC 366), it was held that an order of anticipatory bail can be issued by a Court of Session or a High Court under section 438, Cr.PC. in case of offences falling under Rule 184 of the Defence and Internal Security of India Rules, 1971 made under the Defence and Internal Security of India Act, 1971.

7. In *Suresh Vasudeva v. State* (1978 CrLJ 677), the Delhi High Court took the view that anticipatory bail can be granted under Section 438, Cr.PC. when a person apprehends arrest whether to be made by a police officer in charge of a police station or by any person who is authorised by law to effect arrest. In that case the petitioner apprehended arrest for alleged offence under Section 56, r/w Section 81 and Section 13(1) of the Foreign Exchange Regulation Act, 1973. Yogeshwar Dayal, J., as he then was, held that Section 438(1) really deals with the statutory conferment of substantive power to order for anticipatory bail to a person apprehending arrest. sub-section (1) of S. 438 has not been made subject to sub-section (3) of this section.'

8. A full Bench of the Andhra Pradesh High Court in *Smt. Sheikh Khasim Bi v. The State* : AIR 1986 AP345 speaking through Jayachandra Reddy as he then was, took the view that sub-section (3) of Section 438, Cr.P.C., does not in any manner restrict the power of the Court to grant anticipatory bail, but on the other hand, it only contains the procedural aspect that is necessary to give effect to the order of anticipatory bail passed under sub-section (1) of Section 438, and the manner in which it could be given effect to. The Madras High Court in *E. Joseph v. The Assistant Collector of Customs Tuticorin* (1982 CrLJ 559), also held the view that the provisions of Section 438, can be applied with respect to offences contemplated under Customs Act, 1962 and anticipatory bail can be granted.

9. It was contended for the State that the Karnataka Forest Act contains special provisions regarding bail under section 104-D and under section 75 of the Act and

that no bail can be granted unless the procedure contained therein is followed. This was considered in the case of Gaffar Sab (supra) and it was held that the provisions of Section 104-D of the Act are not a bar for grant of anticipatory bail. The provisions of Section 104-D will be applicable if the person applying for bail is in custody and do not apply when the application is made for grant of anticipatory bail apprehending arrest.

10. The learned Judge in Shankar Nayak case (1991 Cri LJ 1468) (Kant) (supra) proceeded on the assumption that sub-section (3) of Section 438, controls the power exercisable under sub-section (1) and held that a direction under sub-section (2) cannot be given to a Forest Officer unless he can be held to be a Police Officer. Consequently, the learned Judge held that persons apprehending arrest for alleged violation of the provisions of the Act cannot be granted anticipatory bail under section 438. This view, in our opinion, is erroneous for the reason that sub-section (1) of Section 438, Cr.P.C. is a substantive provision and is not controlled by sub-section (3). The directions under sub-section (3) relate to police officers in charge of Police Stations, whereas the imposition of conditions while passing orders under sub-section (1) may include directions to enable the officer empowered to arrest a person for alleged offences under any penal provisions under any Act. In that view of the matter, the decision in Shankar Nayak's case does not enunciate the correct law.

11. The power to arrest without warrant under section 74, the power to release a person arrested under section 75 and the special provisions regarding bail contained in Section 104-D of the Forest Act do not stand in the way of the High Court and the Sessions Court in granting anticipatory bail under section 438, Cr.P.C.

12. The petitions filed by the petitioners were rejected by the learned Sessions Judge as not maintainable and there was no consideration on merits of the cases. We direct the learned Principal Sessions Judge, Shimoga to consider Criminal Petition Nos. 150 of 1994 and 164 of 1994 on merits and to pass the orders thereon in accordance with law.

13. Order accordingly.

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