

Mohan Behera and Two ors. Vs. State

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Court : Orissa

Decided On : Dec-21-1984

Reported in : 1985(I)OLR90

Judge : B.K. Behera, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 437, 438, 438(1), 438(2), 438(3), and 439

Appeal No. : Criminal Miscellaneous Case No. 833 of 1984

Appellant : Mohan Behera and Two ors.

Respondent : State

Advocate for Def. : A. Rath, Additional Standing Counsel

Advocate for Pet/Ap. : D. Nayak, A. Deo and S.P. Dhal

Disposition : Application dismissed

Judgement :

B.K. Behera, J.

1. Accused of an offence punishable under section 307 react with section 34 of the Indian Penal Code, the petitioners seek an order under section 438 of the Code of Criminal Procedure (for short, 'the Code') for anticipatory bail. As averred in the

application and submitted before this Court, the petitioners had been arrested and released on bail by the investigating police officer in the course of investigation and three other persons accused of the same offence in the same case had been released on bail at that stage under section 438 of the Code. A charge-sheet has now been placed, cognisance has been taken and it has been submitted on behalf of the petitioners that in pursuance of the warrants of arrest issued against the petitioners, the police agency is searching for them for their arrest and production in the Court of the learned Subdivisional Judicial Magistrate, Nayagarh. One of the petitioners is said to be a Law Graduate who has applied to the State Bar Council for enrolment as an Advocate, as stated in the application. In these circumstances, the learned counsel for the petitioners has submitted that it is a fit case in which an order under section 438 of the Code should be passed. This application has been resisted by the State and it has been submitted that when on the basis of the materials placed by the investigating agency, cognisance of the offence has been taken and after their arrest, the petitioners had already been released on bail and now after proper application of mind, warrants of arrest have been issued by the learned Sub-divisional Judicial Magistrate, the application under section 438 of the Code is not competent and should not be allowed.

2. The provision relating to anticipatory bail has not been made to help persons accused of commission of grave and heinous offences avoiding their arrest. Recommending to keep a provision for anticipatory bail, the Law Commission had said :

'Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some

days and then apply for bail.'

Clause 447 of the Bill provided for anticipatory bail. The framers of the Code observed in this respect thus :

'As recommended by the Commission, a new provision is being made enabling the superior Courts to grant anticipatory bail, i.e., a 'direction to release a person on bail issued even before the person is arrested. With a view to avoid the possibility of the person hampering the investigation, special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the investigating officer as and when required and shall not do . anything to hamper investigation.'

The Joint Committee made the following observation in this connection :

'Clause 438 (original Cl. 447) _The Committee is of the opinion that certain specific conditions for the grant of anticipatory bail should be laid down in the clause itself for being complied with, before the anticipatory bail is granted. The clause has been amended accordingly.'

3. The scope and applicability of section 438 of the Code have been discussed in AIR 1980 S. C. 1632 : Gurbaksh Singh and Anr. v. The State of Punjab, and the Supreme Court has laid down the law. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and, therefore, means release from custody, the latter is granted in anticipation of arrest and is, therefore, effective at the very moment of arrest. The High Court and the Court of Session are to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and in the circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in section 437 or which are generally considered to be relevant under section 439 of the Code. There is, however, no warrant for reading into section 438 the conditions subject to which bail can be granted under section 437(1) of the Code. The High Court and the Court of Session should be left free . to exercise their jurisdiction under section

438 by a wise and careful use of their discretion and by acting objectively and in consonance with the principles governing the grant of bail which are recognised over the years. Anticipatory bail is a device to secure the 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. When application for anticipatory bail is made, the Court must apply its mind to the question and decide whether a case has been made out for granting such relief. The provisions of section 438 cannot be invoked after the arrest of the accused. The grant of anticipatory bail to an accused who is under arrest involves a contradiction in terms. After arrest, the accused must seek his remedy under section 437 or 439 of the Code if he wants to be released on bail in respect of the offence or offences for which he is arrested.

4. The question as to whether an order under section 438 of the Code can be passed after processes are issued by a Court came up for consideration in 51 (1981) C. L. T. 391 : Bhramar alias Bhramarbar Mahapatra and Anr. v. State of Orissa, where the question also arose as to what would be the meaning of the word 'appearance' within the meaning of section 437 of the Code. The interpretation given in respect of the word 'appearance' has not been accepted by a Division Bench of this Court in 55 (1983) C. L. T. 419 : State v. Maguni Charan Sahu and Ors., with which this Court is not concerned in the instant case. With regard to the relevant question involved, this Court has held that section 438 deals with the grant of anticipatory bail which means bail in . anticipation of arrest and this section does not take in its ambit the case of an accused against whom a Court has already issued process by taking cognisance of the offence. The principles laid down in AIR 1980 S. C. 1632 (supra), had not been referred to, but the view of this Court is not contrary to any of the views expressed by the Supreme Court therein.

5. The learned counsel for the petitioners has invited my attention to a decision of the Madhya Pradesh High Court reported in 1979 Cri. L. J. 1483 : Ramewar and Ors. v. State of M. P. Differing from the view taken by the Rajasthan High Court in 1975 Cri. L. J. 691: Rawat Dan v. State of Rajasthan, it has been held by the Madhya Pradesh High Court that the expression 'when any person has reason

to believe that he may be arrested' in section 433 does not refer to a particular time or stage of such apprehension of arrest and it is apprehension of any person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, which has to be given due consideration and weight. If this apprehension continues even at the stage of committal proceedings, there is nothing in the section debarring him from applying for an anticipatory bail in case of his apprehended commitment under custody, as held therein. The view taken by this High Court in 51 (1981) C. L. T. 391 (supra), however, seems to be in consonance with the scope of section 438 of the Code.

6. In 1984 All India Cr. L. R. 228: Allala Kamalakar Rao v. State of Andhra Pradesh a Division Bench of the Andhra Pradesh High Court has taken note of the principles laid down in AIR 1980 S. C. 1632 (supra) and has observed and held :

'When the process of Court is set in motion by filing the charge-sheet and issue of non-bailable warrant the applicant is precluded from having recourse to section 438, Cr. P. C, for anticipatory bail. section 438(3), Cr. P. C, makes the position explicitly clear that the warrant has to be modulated if the order under section 438 preceded the initiation of proceedings before the Magistrate. section 438(3) is concerned with a situation of taking cognisance of the offence and issuance of warrant subsequent to or during the subsistence of the order under section 438(1), Cr. P. C. The question of passing the order under section 438(1) is not visualised when the proceeding commences before the Magistrate. section 438(3) is confined to vary the warrant in the event of the order under section 438 and there is absolutely no indication of cancellation or with-drawl of warrant. Therefore, the power under section 438 does not survive the initiation of proceedings by filing charge-sheet and issue of arrest warrant. In the absence of provision for cancellation or withdrawal of warrant the situation of parallel exercise of power arises when the order under section 438 is passed subsequent to issue of warrant. The essence of section 438(3) is that the Magistrate has to vary the warrant if the proceedings commence after the order is passed under Section 438(1) and the terminal of the exercise of power under section 438 is the initiation of proceedings under Cr. P. C, by the Magistrate.'

7. It would be seen that section 438 of the Code envisages three stages. Sub-section (1) enables a person for making an application for anticipatory bail when he reasonably apprehends his arrest in respect of accusation of commission of a non-bailable offence. Sub-section (2) enumerates the conditions which may be imposed by the Court while making an order under Section 438(1). Sub-section (3) pertains to the execution or implementation of the order passed under Sub-section (1). The first part of Sub-section (3) mandates the police officer to release the person on bail pursuant to an order made under Sub-section (1). The second part of this sub-section obligates the Magistrate taking cognisance of an offence to issue bailable warrant only instead of non-bailable warrant against the person in whose favour an order under Sub-section (1) has been passed. Sub-section (3) would come into play only after an order under Sub-section (1) has been passed in favour of a person. If a Magistrate has already taken cognisance of an offence and has issued a non-bailable warrant, the stage tot invoking the jurisdiction of the High Court of the Court of Session for an order for anticipatory bail is already over. If the submission of the learned counsel for the petitioners in the instant case is accepted, it would also mean that if a person has already been arrested in execution of a warrant of arrest issued by a Magistrate who has taken cognisance of an offence and is later released on bail and then jumps bail and the Magistrate again issues a non-bailable warrant of arrest against him, that person may approach the Court for anticipatory bail section 438 of the Code certainly does not envisage such a position. The petitioners had already been arrested in the course of investigation and had been released on bail by the investigating agency. After the submission of charge-sheet, non-bailable warrants of arrest have been issued against the petitioners by the learned Subdivisional Judicial Magistrate after applying his mind and taking cognisance. In such a case, an application under section 438 of the Code would not be competent.

8. For the foregoing reasons, I would hold that in a case of this nature, the application for anticipatory bail is not competent and is not to be entertained. It would be open to the petitioners, if so advised, to surrender to custody and move the appropriate Court for their release on bail.

9. The application is accordingly dismissed.

